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IN THE

Supreme Court of the United States

October Term 1960

No. 306

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

No. 307

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES,

Appellant,

vs.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF OF APPELLEE RAILROAD COMPANIES*

*Spokane, Portland and Seattle Railway Company; Great Northern Railway Company; Northern Pacific Railway Company; Oregon Electric Railway Company; Oregon Trunk Railway; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago, Rock Island and Pacific Railroad Company, and The Minneapolis & St. Louis Railway Company.

STATEMENT

These cases are before the Court on direct appeals by Chicago, Milwaukee, St. Paul and Pacific Railroad Company (R. 171) (referred to herein as the Milwaukee) and the Secretary of Agriculture (R. 174) under Section 1253 of 28 U.S.C. from a judgment entered March 25, 1960, by a unanimous three-judge court convened pursuant to Sections 2284 and 2328 of 28 U.S.C., *Chicago, Milwaukee, St. Paul and Pacific Railroad Company v. United States*, 182 F. Supp. 81 (R. 157-170).

In the action below the Milwaukee, as plaintiff, sought to enjoin an order of the Interstate Commerce Commission dated May 10, 1957 (R. 1-12). The Secretary of Agriculture intervened as a party plaintiff (R. 43), and filed his complaint seeking the same relief (R. 45). These appellees were defendants or intervening defendants (R. 1, 54, 67). The Commission's order was made in its Docket 31466, *Chicago, Milwaukee, St. Paul and Pacific Railroad Company v. Spokane, Portland and Seattle Railway Company, et al.*, 300 I.C.C. 453 (R. 152). That order denied relief and dismissed the complaint. The judgment below denied the injunction sought (R. 170).

The Milwaukee, in its amended complaint before the Commission, asserted that the refusal of the Spokane, Portland and Seattle Railway Company (herein referred to as the SP&S) and its two wholly-owned subsidiaries, Oregon Electric Railway Company and Oregon Trunk Railway (collectively referred to as the SP&S System), to join with the Milwaukee in joint through rates and through routes between points on the SP&S System and points on the Milwaukee and its connections, with interchange at Spokane, Wash-

ington, resulted in violations of Sections 1(4), 3(1) and 3(4) of the Interstate Commerce Act (49 U.S.C.) (R. 13-23). The Milwaukee asked the Commission to require, over its lines and its connections to and from points on the SP&S System, through routes and joint through rates as extensive as those available via the Great Northern and Northern Pacific, herein referred to as the Northern Lines (R. 21).

The lines of the SP&S System extend southwesterly from Spokane through the state of Washington and into Oregon (R. 94-95). (See map, Appendix B.) All of the stock and bonds of the SP&S are owned equally by the two Northern Lines (R. 97). Both of the Northern Lines extend from termini at Portland, Oregon, and in western Washington easterly to Spokane and thence to termini at Minneapolis and St. Paul, Minnesota, and at the head of the Great Lakes at Duluth, Minnesota, and Superior, Wisconsin (R. 96). The Milwaukee extends from western Washington easterly to Chicago, Illinois, and Westport, Indiana (R. 95). It serves Spokane by a branch line extending north from its main line (R. 95). (See map, Appendix C.)

The SP&S joins with the Northern Lines in joint through rates on all important commodities (R. 104) between points on the SP&S System and points on the Northern Lines and their connections throughout the United States and Canada (R. 143). Over these routes the Northern Lines retain their long hauls on traffic interchanged with the SP&S (R. 107).

The SP&S has been in operation since 1909 and was built by the Northern Lines jointly. Their close control of this subsidiary, which extends not only to traffic policy but to financial, operating and all other phases of management, is described in detail by the Commission in its report (R. 96-101).

The SP&S System and the Northern Lines resisted the complaint before the Commission on the ground that the SP&S System is "operated in conjunction and under a common management or control" with the Northern Lines and, consequently, that under Section 15(4) of the Act the Commission could not establish through routes by which they would be "short-hauled" without their consent (R. 190, 192). This is denied by the Milwaukee (R. 220).

The construction of the SP&S as it now exists was the result of direct investment by the Northern Lines equally aggregating $76,403,278, outside capital represented by equipment obligations $9,310,672, and funds derived from SP&S operations to the extent of $82,467,168. This amount last stated was available due to the fact that the Northern Lines had acquiesced in the default by the SP&S in the payment of interest on its bonds held by the Northern Lines. From 1926 to 1952 accrued and unpaid bond interest aggregated $79,465,638 and as of December 31, 1952, the Northern Lines forgave that indebtedness in its entirety (R. 97). The SP&S has never paid any dividends on its $40,000,000 of stock held by the Northern Lines (R. 98). The Commission, after reviewing the financial history of the SP&S, concluded as follows:

> "* * * it appears that it has cost the northern lines approximately $218,000,000 to keep the S.P.&S. in operation since 1910." (R. 98)

In several proceedings before the Commission, it has been developed that the purpose of investments in SP&S properties was to produce traffic from which the Northern Lines would receive the long hauls over their lines. *Construction of Railroad Lines in Eastern Oregon*, 111 I.C.C. 3, 36; *Oregon*

Electric Ry. Co. Construction, 162 I.C.C. 386, 387; *Oregon Electric Ry. Co. Construction*, 170 I.C.C. 313, 315; *Oregon Electric Ry. Co. Proposed Construction*, 180 I.C.C. 28, 31; *Oregon Electric Ry. Co. Proposed Construction*, 189 I.C.C. 262, 267; 193 I.C.C. 619, 621, 625; *Oregon Electric Ry. Co. Bonds*, 224 I.C.C. 229, 230.

The Milwaukee in this case, with no investment in the properties which make the traffic possible, seeks to obtain routes which will enable it to compete directly and on a parity with the Northern Lines, which made the sacrifices to produce the traffic.

There have been published a full line of joint through rates on forest products from SP&S points to local points and some common points on the Milwaukee east of Spokane and a number of joint through rates on other commodities between SP&S points and Milwaukee local territory west of the Twin Cities. Whenever there is indication of a need therefor, the Northern Lines are agreeable to the establishment of additional joint through rates between the SP&S and the Milwaukee on other classes and commodities to and from Milwaukee local territory (R. 120). The result is that this controversy affects only "bridge" traffic, as to which the Milwaukee would like to be an intermediate carrier, and traffic which moves to or from common points served not only by the Milwaukee or its connections but by the Northern Pacific, Great Northern or their connections. Since the Milwaukee seeks rates on this traffic the same as those applying via the Northern Lines, its complaint is in substance one for an additional or alternate route at rates no lower than those which shippers now pay over other available routes.

Questioned concerning its reasons for filing the complaint, the Milwaukee's president frankly stated "Naturally our

principal motivation was to increase our revenues." He admitted that this would be at the expense of the Northern Lines (R. 302).

The other railroad appellees participate with the Northern Lines in joint rates to and from points on the SP&S System. They interchange a substantial volume of traffic with the Northern Lines at Minneapolis and St. Paul, Minnesota, and other eastern gateways (R. 96). Before the Commission they asserted that if the Milwaukee, which competes with them for this traffic east of the Twin Cities and other gateways, were accorded a competitive route west of these gateways also, their long-standing interline business would be placed in jeopardy (R. 121-122, 2328, 2334-2335, 2436-2439, 2457-2475, 2484-2485).

The issues in the case before the District Court, as stated in the Court's order of January 8, 1960, following a pretrial conference held on December 15, 1959, were as follows:

> "It was agreed that the principal issues to be litigated in this cause and decided by this Court are:
>
> "(1) Did the Commission err in finding and concluding that with certain exceptions there are no through routes between points on the S.P.&S. System, on the one hand, and, on the other, points throughout the United States generally east of Spokane and Canada in connection with the Milwaukee road via Spokane?
>
> "(2) Did the Commission err in finding and concluding that the S.P.&S. System is operated in conjunction and under a common management and control with the northern lines within the meaning of Section 15(4) of the Interstate Commerce Act?
>
> "(3) Did the Commission err in finding and concluding that it is not necessary or desirable in the public interest in order to provide adequate and more efficient or more economic transportation to require

the establishment of through routes and joint rates with reference to certain commodities in connection with the S.P.&S. System and the Milwaukee and its connections via Spokane the same as apply in connection with the S.P.&S. System and the northern lines and their connections via Spokane?

"(4) Did the Commission err in finding and concluding that the refusal of the S.P.&S. System to participate in joint rates with the Milwaukee Road and its connections similar to those in effect with the northern lines and their connections was not a violation of Sections 1(4), 3(1), or 3(4) of the Act?" (R. 154-157)

The District Court held against appellants on all four issues (R. 160, 170).

Appellants now assert that the District Court erred in its conclusions with respect to each of the issues.

SUMMARY OF ARGUMENT

I

The lower court correctly sustained, as supported by substantial evidence, the Commission's finding that through routes, with the exceptions stated by the Commission, do not exist over the SP&S-Milwaukee route via Spokane, Washington.

The published joint through rates over the SP&S-Milwaukee route listed in Appendix B to the Commission's report, being the exceptions noted by the Commission, are not evidence of the existence of through routes between points or on commodities not specifically covered by the tariffs referred to in Appendix B.

The test of the existence of a through route is whether the carriers involved "hold themselves out" as offering such through transportation service.

In this case there is no evidence that the SP&S and the Milwaukee "hold themselves out" as offering through transportation service on any traffic other than that which is subject to the tariffs referred to in Appendix B.

The fact that the SP&S and the Milwaukee interchanged 513 carloads at Spokane in 1952, which moved on through bills of lading, is no evidence of such "holding out" to prove the existence of through routes when it appears, as it does in this case, that all of such cars moved on joint through rates and none moved on combination rates.

II

If the prohibition against short-hauling contained in Section 15(4) has been applied by the Commission in this case in a just and reasoned manner, the Commission's order must be sustained. The language of Section 15(4) may reasonably be applied in the manner here applied by the Commission.

Through the years, in its administration of the rate-making sections of the Act (to which Section 15(4) is related), the Commission has sanctioned higher rates for joint-line than for single-line hauls and has approved "arbitraries" for movements over short or weak lines. But these higher rates or arbitraries have been denied in the case of movements over connecting lines under common management or control because of the economies which affiliated or system operation makes possible. The traditional test of common management or control in rate-level cases has been control of traffic policy.

The same test has been applied by the Commission in Section 15(4) cases.

In numerous rate-level cases where the traffic policy of a subsidiary has been controlled by two co-equal owners, higher joint-line rates or arbitraries have been denied. To deny also to such lines the protection against short-hauling provided in Section 15(4) would deprive them of the very operating benefits which led the Commission to refuse them higher rates or arbitraries. In at least one decision prior to 1940 the Commission indicated, though it did not squarely decide, that it would hold, in applying Section 15(4), that each of two co-equal owners controlling the traffic policy of a subsidiary would be regarded as under common management or control with such subsidiary so as to be protected against short-hauling under Section 15(4).

The facts found by the Commission in this case as to the extent of control exercised by the Northern Lines, including control of traffic policy, satisfy the test of the existence of common management or control traditionally and consistently applied in the Commission's decisions. In seven previous decisions the SP&S has been held a part of the Great Northern and Northern Pacific for rate-making purposes.

The "control of traffic policy" test long followed by the Commission in its application of Section 15(4) has been approved by Congress by re-enactment of Section 15(4) in the Transportation Act of 1940 with no change in the language here pertinent. Such application is in harmony with the legislative history of this section.

The necessity for consistency by the Commission in the administration of all of the provisions of Section 15 requires an application of Section 15(4) which permits two carriers

otherwise competitive and exercising control of traffic policy of a jointly owned subsidiary to be protected in their long hauls under the provisions of Section 15(4).

Furthermore, application of Section 15(4) in a manner consistent with this Court's interpretation of Section 3(4), which prohibits discrimination against connecting lines, requires that the Northern Lines be afforded protection against short-hauling in this case.

The authorities cited by appellants support only the position that stock ownership of a subsidiary, without exercise of actual control, is insufficient to establish "common management or control." If "common management or control" as that phrase has been applied by the Commission is not exercised by the owning carriers, they are, of course, not entitled to protection against short-hauling.

III

The lower court correctly sustained the finding that the additional through routes requested over the SP&S-Milwaukee route via Spokane are not shown to be necessary or desirable in the public interest within the meaning of Section 15(3), and are not shown to be necessary in order to provide "adequate and more efficient or more economic, transportation" within the meaning of the second exception stated in Section 15(4).

Appellants, in arguing that the Commission erred in this finding, limit themselves to a brief summary of some of the direct testimony of the witnesses who appeared for the complainant or appeared for interveners supporting the complainant before the Commission. Counsel make no attempt

to summarize the cross-examination of those same witnesses or the opposing testimony.

The Court should not set aside the finding of the Commission except upon a conclusion that the entire evidence in the record is insufficient to support the conclusion that the findings are supported by substantial evidence.

IV

A. *The Issue Under Section 3(1) of the Act*

Section 3(1) declares to be unlawful any "undue or unreasonable" preference or advantage or prejudice or disadvantage to any person, locality, or description of traffic, but any such preference or prejudice which is not "undue or unreasonable" is not unlawful. Whether any such preference or prejudice "is undue or unreasonable" is a question of fact to be determined by the Commission.

In this case the Commission has found that there is no such preference or prej[redacted]e extent necessary to support a finding of unlawfulness under Section 3(1). The Commission's finding is supported by substantial evidence.

In these circumstances it is not necessary to discuss the authorities on the point whether, if such undue or unreasonable preference or prejudice existed, an order could be directed against any of these appellees to remove it.

B. *The Issue Under Section 3(4) of the Act*

Section 3(4) makes it unlawful for a carrier to discriminate in its rates, fares and charges between connecting carriers.

The Commission has found that the refusal of the SP&S to join with the Milwaukee in the requested routes via Spokane does not result in discrimination against the Milwaukee.

If the SP&S is under common management or control with the Northern Lines to be entitled to the protection of Section 15(4) against short-hauling, the refusal of the SP&S to join in the requested routes with the Milwaukee does not constitute violation of Section 3(4). This is conceded by appellant Milwaukee. Since the Commission's application of Section 15(4) in this case was warranted and reasonable, its determination of the issue under Section 3(4) was manifestly justified.

C. *The Issue Under Section 1(4) of the Act*

Section 1(4) requires every common carrier to establish reasonable through routes and just and reasonable rates applicable thereto.

However, if carriers are under common management or control to be entitled to protection against short-hauling under Section 15(4), the refusal to join in rates which would short haul them is not a violation of Section 1(4).

The provisions of Section 1(4) are subordinate to the specific provisions of Section 15 for the establishment of through routes and joint rates.

ARGUMENT

I. The District Court correctly sustained the Commission's finding that with certain limited exceptions there are no through routes over the SP&S System and the Milwaukee via Spokane.

The first issue in this case, as presented to the District Court (R. 156), involved the correctness of the Commission's finding reading as follows:

> "In view of the foregoing, we find that, with the exceptions above mentioned, there are no through routes, as that term is used in the act, between the areas comprised in the complaint, in connection with the S.P.&S. System and the Milwaukee via Spokane." (R. 94)

Appellants now assert that this finding is contrary to the evidence, that through routes already exist over the SP&S System and the Milwaukee via Spokane, and consequently, that the Commission erred in concluding that complainant could prevail only if the record supports necessary findings under Section 15(3) and Section 15(4).

The finding above quoted was contained in the examiner's proposed report (R. 232). The Milwaukee in its exceptions to the proposed report did not except thereto. In its reply to the exceptions filed by other parties, however, the Milwaukee for the first time argued that through routes already existed. A motion to strike this belated argument was granted by the Commission (R. 94, footnote 6).

The lower court sustained the Commission's finding since it was supported by substantial evidence (R.170).

The SP&S System joins with the Milwaukee in a limited number of joint through rates, as shown in Appendix B of

the Commission's report (R. 149). The routes over which these rates apply are those referred to in the foregoing finding as "the exceptions above mentioned" (R. 90).

Illustrative of existing joint through rates are the rates on petroleum products from East Pasco, Washington, a point on the SP&S, to seven named stations on the Milwaukee in Idaho and Washington (R. 150).

These joint through rates are not evidence of the existence of through routes on products other than those specifically covered by the published tariffs or between points other than those named in the tariffs. In *Thompson v. United States*, 343 U.S. 549, the Court said at page 559:

> "Through service to points short of Omaha cannot be used as evidence of the existence of a through route to Omaha unless we are to hold that compliance with Section 1(4) causes the Missouri Pacific to lose its right to serve Omaha via its own lines, a right guaranteed by Section 15(4). We reject the Commission's argument that the existence of through routes from Lenora to points on the Burlington line short of Omaha proves the existence of a through route to Omaha via the Burlington as requiring an unwarranted distortion of the statutory pattern."

In *Denver & Rio Grande Western v. Union Pacific R. Co.*, 287 I.C.C. 611, it appeared that there were joint through rates and through routes on eastbound sheep and goats (Id. p. 619, note 3; p. 639), and on lumber from Union Pacific points to local points on the Rio Grande (Id. 646).* The Commission's finding that through routes did not exist on

*These lumber rates are similar to the joint through rates on lumber applicable from SP&S System points to local points and some common points on the Milwaukee east of Spokane. Appendix D of Commission's report (R. 149).

other commodities was upheld in *Denver & Rio Grande Western R. Co. v. Union Pacific R. Co.*, 351 U.S. 321.

In the *Thompson* case the Court said at page 557:

> "In short, the test of the existence of a 'through route' is whether the participating carriers *hold themselves out* as offering through transportation service." (Emphasis supplied.)

In the *Denver & Rio Grande Western* case this Court said at page 330:

> "We adhere to the 'holding out' test of the *Thompson* case."

There is substantial evidence that the SP&S and the Milwaukee do not "hold themselves out" as offering through service via Spokane other than that covered by the few joint through rates enumerated by the Commission in Appendix B of its report.

The first point made by appellants (Milw. Br. 58; Sec'y. Br. 29) rests upon the language in the Commission's report (R. 88), generally to the effect that routes are available to and from points on the SP&S via Spokane in connection with the Milwaukee and its eastern connections but that the shippers would have to pay combination rates if such routes were used. The Commission stated that the higher rates and charges act as a deterrent to the shippers and in effect close the Spokane gateway in a commercial sense. Counsel then cite *Virginian Railroad Co. v. United States*, 272 U.S. 658, and *Great Northern Railway Company v. United States*, 81 F. Supp. 921 (aff'd. 336 U.S. 933).

Following the passage quoted in appellants' briefs, the Commission made it clear that the routes referred to as available via Spokane are not *through* routes within the

meaning of Section 15(3) and Section 15(4) of the Act (R. 90).* It follows, then, that the *Virginian* case is not authority for the conclusion that the route via Spokane is a through route.

The court in the *Virginian* case, at page 666, said as follows:

> "But the order here in question was not sought or made under Section 15(3) and does not direct the establishment of through routes and joint rates. *Through routes to the West were already in existence and there were through rates by combination.*" (Emphasis supplied.)

The decision in the *Virginian* case holds only that if through routes exist though the applicable rates thereover are combination rates, they are nevertheless through routes even though "closed commercially." (Id. p. 661. There is nothing in that decision which dispenses with the necessity for proof of the existence of a through route to empower the Commission to establish rates over the requested route except in the exercise of its powers under Section 15(3) of the act, as restricted by the short-hauling provisions of Section 15(4). In the *Thompson* case (343 U.S. 549) this Court distinguishes the *Virginian* case saying in a footnote at page 560:

> "Virginian Railroad Co. v. United States, 272 U. S. 658, is inapposite since through routes were found to be in existence but commercially closed solely because of the unreasonable and discriminatory rates charged by the Virginian over its portion of the route."

*The Commission's statement (R. 90) is taken verbatim from its decision in the *Rio Grande case*, 287 I.C.C. 611, 615-616.

In this case through routes, with the exceptions noted by the Commission, do not exist and necessarily any relief can be granted only in the exercise by the Commission of its powers under Sections 15(3) and 15(4). The *Virginian* case is not authority to the contrary.

Counsel also cite *Great Northern Railway Company v. United States*, 81 F. Supp. 921 (aff'd. 336 U.S. 933), which in turn sustained an order of the Commission in *General Mills, Inc. v. Great Northern Railway Company*, 269 I.C.C. 457.

The decision in the *General Mills* case does not go even as far as did the *Virginian* case wherein the Commission directed a reduction in rates over the existing through route. In the *General Mills* case a joint through rate on grain had been published by the carriers to apply from origins on the Great Northern in north central Montana southerly through Great Falls and Butte thence Union Pacific to destinations in California. In the order there assailed the Commission made no change in that rate. As published, the rate permitted milling in transit at mills south of Butte but not at Great Falls. The Commission merely required transit at Great Falls. It was contended by the carrier that this requirement constituted the establishment of a new through route but that contention was held by the Commission and the District Court to be without merit. The District Court, at page 925, said:

> "We think that transit is an accompaniment or supplementary advantage in connection with an existing through route but does not in itself create the through route. The existence of the transit implies the existence of a through route. Transit at a particular point is a voluntary or required action of the particular carrier at such point but *a through route is not created by creating a transit.*" (Emphasis supplied.)

The case is authority only for the proposition that if a through route exists, the Commission is not restricted in the ordering of accessorial privileges over the existing through route by the provisions of Sections 15(3) and 15(4). The rule applies, however, only if the through route exists and the case does not relax the rule relating to the necessity of proving the existence of a through route.

If the conclusion which counsel here urge, based on the quoted language from the Commission's report (R. 88) were sound, then every route in the United States where there are physical track connections would constitute a *through* route and there would never be any occasion for the Commission to exercise its powers under Section 15(3) to establish new through routes. Counsel's position, which would in effect repeal Section 15(3), is obviously untenable. The fallacy of this position was pointed out by this court in the *Thompson* case, 343 U.S. 549, 559.

Counsel for appellants (Milw. Br. 59; Sec'y. Br. 37) refer to a few existing joint through rates as enumerated by the Commission in Appendix B (R. 149), and apparently would argue that these cited existing joint through rates compel the conclusion that there is a through route available on all traffic which could be interchanged between the SP&S and the Milwaukee at Spokane.

Counsel first refer to through routes on all commodities moving in export or import traffic through ports served by the SP&S to and from certain points on the Milwaukee and its connections (Milw. Br. 59, par. (A)). Appendix B of the Commission's report indicates that these export and import rates apply only to and from named SP&S tidewater ports on the Columbia and Willamette Rivers. They are not evidence of through routes on anything other than

export or import traffic and specifically do not apply to any traffic which lacks those characteristics. Furthermore, joint through rates to and from certain designated tidewater ports on the SP&S System are not evidence of through routes to or from any inland points on the SP&S System. *Thompson v. United States*, 343 U.S. 549, 559. For example, they are not evidence of the existence of a through route on any commodity to or from a point on the SP&S System such as Eugene, Oregon, some 125 miles south of Portland, via Spokane and the Milwaukee beyond.

Counsel next (Milw. Br. 59, par. (B); Sec'y. Br. 37) point to the existence of rates on lumber and forest products from origins on the SP&S System to all local and some common points on the Milwaukee. These lumber rates are similar to the through routes and through rates on lumber applying from Union Pacific points to local points on the Denver & Rio Grande Western, which were described by the Commission in its report in *Denver & Rio Grande Western Railroad Company v. Union Pacific R. Company*, 287 I.C.C., 611, 646. Despite the existence of those limited through routes on lumber in the *Rio Grande* case, this Court in *Denver & Rio Grande Western R. Co. v. Union Pacific R. Co.*, 351 U.S. 321, affirmed the conclusion of the Commission that through routes did not exist on other commodities or to ports beyond the Rio Grande. The conclusion must be the same in this case.

Finally, counsel cite the existence of through routes on all commodities "east of the Twin Cities" between points on the SP&S and points on the Milwaukee and its connections (Milw. Br. 59 par. (C)). These routes do not apply in connection with the Milwaukee via Spokane. On the contrary the SP&S joins in through routes via Spokane

with the Great Northern and Northern Pacific to the Twin Cities in Minnesota and thence beyond via the Milwaukee and other Western Trunk Line carriers to points on the Milwaukee and other lines. Under those through routes the Northern Lines retain their long hauls between Spokane and the Twin Cities and the Milwaukee and other carriers receive the traffic only for handling beyond the eastern terminus of the Northern Lines at the Twin Cities. Obviously, those through routes are not evidence of the existence of a through route which would enable the Milwaukee to receive the traffic at Spokane and thus deprive the Northern Lines of their long hauls between Spokane and the Twin Cities.

Counsel (Milw. Br. 63) attempt to distinguish the decision of this Court in the *Rio Grande* case based upon the fact that five commissioners in the case before the Commission were of the opinion that through routes existed on all commodities and five were of the opinion that such through routes were not in existence. The Court commented on this division of the Commission in footnote 3 at page 325 of the decision reading as follows:

> "Five commissioners thought that through routes were in existence; five were of the opinion that they were not. Under Interstate Commerce Commission practice this meant the Rio Grande had failed to prove its allegations that through routes exist."

Counsel say that this Court carefully withheld comment, which would indicate agreement or disagreement with either group of commissioners, when the Court said:

> "Whether the evidence would have justified the Commission in finding the existence of through routes we need not determine."

The Court, immediately following the language which counsel quote, said:

> "We are satisfied, however, that the evidence before the Commission would not compel it to make such a finding and that *its conclusion that the through routes claimed were not in existence is supported by substantial evidence.*" (Emphasis supplied.)

There was no occasion for this Court to take any position on that question of fact. Its only function was to determine whether the finding as made by the Commission was supported by substantial evidence and it properly refrained from deciding whether a finding different from that which the Commission made would have been sustained, as supported by substantial evidence, because that question was not before the court.

Finally, counsel (Milw. Br. 65; Sec'y. Br. 37-38) refer to the fact that during 1952, 513 cars were interchanged between the SP&S System and the Milwaukee at Spokane on through bills of lading* and proceed to name the commodities included in the 513 cars. An analysis of Milwaukee's Exhibit 1 (R. 3117) shows that the 513 cars contained products as follows:

Eastbound		
Sheep and goats	25	
Forest products	166	
Petroleum products	302	
Containers returned empty	1	
		494
Westbound		
Laundry equipment	1	

*As contrasted with these 513 carloads, the traffic interchanged in 1953 between the Northern Lines and the SP&S moving both eastbound and westbound totaled 53,923 carloads (R. 120-121).

Candy and confectionery	2	
Food products, NOS	1	
Starch	1	
Manufacturers and Miscellaneous, NOS	2	
Chemicals, NOS	2	
Soap and washing detergent	1	
Furniture, NOS	1	
Insecticides and fungicides	1	
Horses, mules and asses	6	
	—	18
		512
One carload of aluminum, which witness Nickels, who presented Exhibit 1, admitted was incorrectly included in the exhibit (R. 286)		1
Total cars		513

Appendix B shows that there are published joint through rates via the SP&S through Spokane and the Milwaukee beyond on lumber products eastbound, on petroleum products eastbound and on livestock eastbound. The appendix does not specifically refer to any tariff relating to containers returned empty, of which one car moved eastbound. Of the 18 westbound carloads, six contained livestock, for which, as indicated in Appendix B, joint through rates were published by the SP&S and the Milwaukee. That leaves only 12 of the westbound cars for which a specific tariff reference cannot be identified in Appendix B.

The foundation for any argument which appellants may make based on the interchange of the 513 cars at Spokane on through bills of lading is destroyed by the finding of the Commission reading as follows:

> "The record indicates that the foregoing 513 shipments moved at joint through rates. There is no indication that any traffic has ever been solicited for routing via Spokane over a Milwaukee-S.P.&S. route by which a higher combination rate applied, or has ever moved over such a route." (R. 98)

The finding of the Commission that through routes with certain exceptions do not exist, as quoted at the beginning of this subdivision of our argument, and the finding last quoted, were contained in the examiner's proposed report (R. 231, 232). As we have already stated, the Milwaukee in its exceptions to the proposed report of the examiner did not except to either of the quoted findings (R. 94, footnote 6). Never, until this brief of the Milwaukee, has the Milwaukee taken exception to the finding last quoted that the 513 cars moved at joint through rates.

Now the Milwaukee and the Secretary except to the finding that the 513 carloads moved at joint through rates and assert that the record shows only that 387 cars moved under joint rates and that 126 cars moved at combination rates (Milw. Br. 66; Sec'y. Br. 38). The witness whose testimony is cited by the counsel testified merely that 387 cars moved under joint through rates but he did not testify that 126 cars or for that matter, a single carload moved at combination rates (R. 321-322).

The inference so drawn by the appellants that 126 cars moved on combination rates is refuted by the testimony of the Milwaukee's own witnesses.

Exhibit 1 before the Commission (R. 3117 et seq.) was presented by the Milwaukee's witness Nickels (R. 284). It consists of a statement of all cars which moved in the year 1952 to or from points on the SP&S System, which the Milwaukee handled to any extent in line-haul, together with a statement of the revenue received by the Milwaukee on all such shipments. An analysis of the exhibit shows that the Milwaukee in that year participated in the line-haul of 6,384 carloads to or from points on the SP&S System. Of that total 513 carloads were interchanged at Spokane and the remaining 5,871 carloads were handled by the Milwaukee only to or from other gateways east of Spokane. Of the total of cars interchanged at other eastern gateways, 5,618 carloads were received by the Milwaukee at Minnesota Transfer on eastbound movements or delivered by the Milwaukee to another carrier at Minnesota Transfer on westbound movements. Minnesota Transfer is at the Twin Cities (R. 1211-1214), the eastern terminus of the Northern Lines.

Exhibit 18 (R. 3146), presented by the Milwaukee's witness Hettinger, contains an estimate by the witness of the revenue which the Milwaukee would have received on all of the carloads listed in Exhibit 1 had the Milwaukee handled all of the 6,384 carloads in long-haul to or from Spokane (R. 1057-1058). For the carloads actually interchanged with the SP&S at Spokane, Exhibit 18 shows "no increase" in revenue. The witness explained why he had shown no increase on cars actually interchanged at Spokane. He stated first as follows:

> "No increase in revenue was computed on carloads which originated or terminated on the Milwaukee railroad and which were actually interchanged between

> the Milwaukee and S.P.&S. at Spokane, as practically all of this traffic moved on through rates, the revenue picture would be unchanged." (R. 1060)

The witness stated further "no increase in revenue was computed on traffic which originated or terminated on foreign lines which actually was interchanged between the Milwaukee and the S.P. and S. at Spokane." (R. 1061.)

Again, an analysis of Exhibit 1 indicates that of the 513 carloads interchanged at Spokane 499 carloads originated or terminated at Milwaukee local stations and only 14 carloads originated or terminated on foreign lines.

Though the witness qualified his statement with respect to the cars originating and terminating at Milwaukee local stations with the words "practically all," he did not state or attempt to show that a single one of those cars or any of the 513 cars moved on combination rates.

The conclusion that none of the 513 cars moved on combination rates is reinforced by the testimony of the SP&S traffic manager. He was asked whether a shipper would be able to route traffic via the SP&S and the Milwaukee for which joint through rates were not in effect. He answered:

> "We have never had any traffic like that offered to us so I am not going to speculate what we would do." (R. 2653)

In the *Denver & Rio Grande Western* case it appeared that in a representative year 55 carloads moved over the Rio Grande-Union Pacific route via Ogden, Utah, on combination rates. Despite this showing, this Court affirmed the Commission's finding as supported by substantial evidence that through routes via that route did not exist.

In this case, where no shipments were shown to have moved on combination rates, it follows with greater force that the finding that through routes, with the exceptions noted, do not exist was correctly sustained by the District Court as supported by substantial evidence.

The Commission and the District Court were correct in their conclusions on this first issue relating to the existence of through routes and that conclusion should be affirmed by this Court.

II. The District Court correctly sustained the Commission's findings under Section 15(4) relating to "common management or control."

The second issue in this case as presented to the District Court involved the correctness of two findings of the Commission next quoted (R. 156).

The first of these findings is as follows:

> "We find that the SP&S System lines are operated in conjunction with and under a common management and control with the Northern Lines as that term is used in Section 15(4) of the Act." (R. 107.)

The finding was repeated in substance when the Commission found as follows:

> "We conclude:
>
> (1) That the SP&S System is operated under a common management and control with and its traffic policy is controlled by the Great Northern and Northern Pacific and therefore must be considered as a part of the latter carrier systems." (R. 141.)

The District Court held that the Commission was correct in these conclusions (R. 170).

Appellants except to none of the facts recited by the Commission (R. 96-101) showing the close control exercised by the Northern Lines over their jointly owned subsidiary, which extends not only to traffic policy but to financial policies, operating matters, and every other phase of management. Appellants' exceptions are to the conclusion of the Commission that two owning carriers may and in this case do exercise control of a jointly owned subsidiary so that the two owners and the subsidiary are entitled to the protection of Section 15(4) against short-hauling. Appellants assert that this is a question of law involving the interpretation of Section 15(4) as a matter of first impression.

In the light of limited function of a court upon review and the long history of administrative holdings by the Commission, the question is not one of first impression before this Court and is a question of fact.

Function of the Court on Review

Where, as here, the question is one of specific application of broad statutory language in a proceeding in which an agency administering the statute must determine it initially, the function of the court upon review is limited, and the interpretation adopted by the agency will be accepted if it has warrant in the record and a reasonable basis in law.

In *Rochester Telephone Corp. v. United States*, 307 U.S. 125, this Court affirmed the conclusion of the Federal Communications Commission that the New York Telephone Company owning substantially less than 50 per cent of the stock of the Rochester Company had "control" of the subsidiary within the meaning of the Federal Communications Act. The Court did not consider the question as one of first

impression despite the fact that the interpretation of the word "control" as used in that act had never before been considered by the Court. On the contrary, the Court held that the determination of "control," as that term was used in the act, was "an issue of fact to be determined by the special circumstances in each case" and that if there was "warrant in the record for the judgment of the expert body, it must stand." (Id. 144-145) The Court went on to say at page 146:

> "The suggestion that the refusal to regard New York ownership of only one third of the common stock of the Rochester as conclusive of the former's lack of control of the latter should invalidate the Commission's finding, disregards actualities in such intercorporate relations. *Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question.* 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' *Mississippi Valley Barge Line Co. v. United States*, 292 U.S. 282, 286, 287; *Swayne & Hoyt v. United States*, 300 U.S. 297, 303 et seq." (Emphasis supplied.)

In *Board v. Hearst Publications*, 322 U.S. 111, the Court declined to disturb the determination by the National Labor Relations Board that newsboys distributing respondent's papers on the street were "employees" within the meaning of the National Labor Relations Act, 29 U.S.C. 152. The Court stated at page 131:

> "* * * where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited.

> Like the commissioner's determination under the Longshoremen's & Harbor Workers' Act, that a man is not a 'member of a crew' (South *Chicago Coal & Dock Co. v. Barrett*, 309 U.S. 251) or that he was injured 'in the course of employment' (*Parker v. Motor Boat Sales*, 314 U.S. 244) and the Federal Communications Commission's determination that one company is under the 'control' of another (*Rochester Telephone Corp. v. United States*, 307 U.S. 125), the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."

Again, in *Gray v. Powell*, 314 U.S. 402, the Court upon review of a determination by the director of the Bituminous Coal Division that a railroad was not the "producer" of coal consumed by it and therefore that the coal was not exempt from the provisions of the Bituminous Coal Act stated at page 411:

> "* * * the function of review placed upon the courts * * * is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner."

Background of Commission's Conclusion That Each of Two Carriers May be, And in This Case Is, Under Common Control With Its Subsidiary So as to Be Entitled to Protection Against Short-hauling Under Section 15(4).

(1) Acting to fix rate levels under Sections 1(5) and 15(1) of the Act, the Commission has, in a number of cases, provided for higher rates for joint-line hauls than

single-line hauls. Moreover, the almost uniform practice has been to permit higher rates or "arbitraries" for movement over short or weak lines (*North Carolina State Highway Commission v. Norfolk & Western Ry. Co.*, 153 I.C.C. 29, 31 (1929)).

(2) But neither the higher rates for joint hauls nor the short-line arbitraries are allowed for movement over connecting lines under common management or control. The Commission's reasoning is that "such [common] management and control [has] resulted in certain benefits in operation and * * * single line rates would be reasonable for application over such lines" (*Livestock To, From and Between Points in the Southeast*, 101 I.C.C. 105 (1925), and other cases).

(3) The test of common management or control in rate level cases has been control of traffic policy.

(4) Where a single subsidiary is shown to be controlled in matters of traffic policy by two competitive coequal owners, the Commission has regarded the subsidiary as a part of the lines of each of such co-owners for rate-making purposes. The numerous Commission cases applying this rule find support in *Chicago, Milwaukee & St. Paul R. Co. v. Minneapolis Civic & Commerce Association*, 247 U.S. 490 (1918).* In seven decisions the Commission has held that

*The case of *Chicago, Milwaukee & St. Paul R. Co. v. Minneapolis Civic & Commerce Association*, 247 U.S. 490, involved the relationship of the Milwaukee road and the Chicago, St. Paul, Minneapolis & Omaha, therein called the Omaha, on the one hand, and Minneapolis Eastern Ry. Co., therein called the Eastern, on the other. The Eastern owned trackage in Minneapolis. The Milwaukee and Omaha each owned or controlled the disposition of 50 per cent of the outstanding stock of Eastern and each owned 50 per cent of the Eastern bonds. Eastern filed separate tariffs under which a charge was made for handling grain to industries on its tracks in addition to the line-haul charges of the owners. The Minnesota Railroad & Warehouse

the SP&S must be considered for rate-making purposes as a part of the systems of the two Northern Lines rather than as an independent line.

(5) In short-hauling cases under Section 15(4) the Commission has followed the control of traffic policy test in determining whether common management or control exists.

(6) Obviously, as the District Court put it at page 168 of the record: "If the long haul of railroads in a joint management and control situation is not protected by Section 15(4) the very benefits which the Commission regards as preventing them from charging higher joint-line scales or arbitraries, i.e., the economies of joint operation, will be taken from them. Clearly, such a result would be inconsistent."

(7) There is a definite relationship between the protection against short-hauling afforded by Section 15(4) and the prohibition in Section 3(4) against discriminating between connecting lines. Plaintiff in this case charges that Section 3(4) is being violated. But plaintiff necessarily concedes, as the District Court says, that "if the S.P.&S. is

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Commission held that those additional charges were discriminatory because the owners imposed no similar charges on traffic of industries located on their separate tracks. The State District Court of Minnesota affirmed the order of the Commission upon a finding that the owning companies "directly controlled and operated" the Eastern company. The judgment was affirmed by the Minnesota Supreme Court in *Minneapolis Civic & Commerce Association* v. *Chicago, Milwaukee & St. Paul R. Co.*, 134 Minn. 169, 158 N.W. 817. The judgment was affirmed by this Court on appeal. In affirming the judgment, this Court expressly found that two competitive railroads owning a subsidiary coequally may, and in that case did, each "directly control and operate" the subsidiary and that where such control is found to exist, the subsidiary must be treated as a part of each of the two owning carriers for rate-making purposes (247 U.S. 490, 501, 502).

under the common management or control of the Northern Lines within the meaning of Section 15(4), then the refusal of the S.P.&S. to accord the Milwaukee equal treatment does not constitute a violation of Section 3(4)" (R. 169). Under the decisions of the Commission plaintiff can take no other position.

(8) In the light of the relationship between Sections 15(4) and 3(4), *Louisville & Nashville R.R. Co. v. United States*, 242 U.S. 60 (1916), supports the conclusion which the Commission is otherwise impelled to reach. There this Court considered the question whether the Louisville & Nashville and the Nashville, Chattanooga & St. Louis, under their joint ownership of Nashville Terminals, were discriminating against the Tennessee Central by requiring their joint agency (Nashville Terminals) to switch for themselves and in refusing to permit it to switch for other lines. It was charged that the two owning carriers were thus discriminating against the Tennessee Central in violation of the then paragraph of Section 3 of the Act which was the forerunner of the present Section 3(4) of the Act (54 Stat. 898, 903). The Court in a decision by Mr. Justice Holmes said as follows:

> "* * * if either carrier owned and used this terminal alone, it could not be found to discriminate against the Tennessee Central by merely refusing to switch for it, that is, to move a car to or from a final or starting point from or to a point of interchange. *We conceive that what is true of one owner would be equally true of two joint owners,* * * *." (Emphasis supplied.)

The underlying reasons for the Commission's conclusion in the instant case are more fully developed below. The controlling authorities are also analyzed. The foregoing summary shows that the result is an application of Section 15(4)

consistent with the Commission's holdings in rate-level cases under Sections 1(5) and 15(1) and discrimination cases under Section 3(4).

The Commission's Application is in Accord With Prior Administrative Interpretation of Section 15(4) Approved by Congress by Re-enactment of Section 15(4) in the Transportation Act of 1940.

The short-hauling limitation under Section 15(4) upon the power of the Commission to establish through routes was first incorporated in the Act by the Mann-Elkins Act of 1910 (36 Stat. 539, 552). Section 15(4) in its present form was adopted as a part of the Transportation Act of 1940 (54 Stat. 898, 911-912). The judicial and legislative history of the short-hauling provision in the interval between the two acts is summarized in *Thompson v. United States*, 343 U.S. 549, 555.

After the unsuccessful effort of the Commission to limit by construction the short-hauling restriction on its powers to establish through routes (*United States v. Missouri Pacific R. Co.*, 278 U.S. 269), the Commission unsuccessfully appealed to Congress to delete the short-hauling restriction. Thus, as stated by Mr. Justice Frankfurter in his dissent in *Denver & Rio Grande Western R. Co. v. Union Pacific R. Co.*, 351 U.S. 321, 336-337:

> "Congress has emphatically made clear that in its view the national interest requires the protection of railroads against being short-hauled. * * * In short, when an order of the Commission is brought under judicial scrutiny and challenge is made that the safeguards of Section 15(4) have not been observed, it is the duty of this court to apply the policy expressed by that section."

The Transportation Act of 1940 changed Section 15(4) as it read theretofore to add a second exception to the restriction on the Commission's power to establish routes which would short-haul a carrier, reading as follows:

> "* * * (b) Unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: * * *" (54 Stat. 898, 911-912);

but the language here pertinent was re-enacted without change.

Re-enactment of the section without change in the pertinent language indicated approval by Congress of the interpretation theretofore given by the Commission to that language in Section 15(4). *Allstate Construction Co. v. Durkin*, 345 U.S. 13: *Maneja v. Wailua Agricultural Co.*, 349 U.S. 254; *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535: *Interstate Commerce Commission v. Parker*, 326 U.S. 60: *United States v. Parker*, 326 U.S. 803.

In this case we have a basis more specific than the general rule just stated to support the conclusion of such congressional approval of the Commission's earlier interpretation of Section 15(4). The 1940 act added to the Interstate Commerce Act a new subparagraph (b) of Section 1(3) (54 Stat. 897, 899) to adopt for certain sections of the Act other than Section 15(4) the interpretation of the word "control" in the decision of this Court in *Rochester Telephone Corp. v. United States*, 307 U.S. 125. The report of the Senate-House Conference Committee (H.Rep. 2832, 76th Cong., Third Session) contains the comment on the proposed amendment of Section 1(3) reading as follows:

"The definition of control was made to apply only in the specified sections because *it was thought undesirable to make any change in the interpretation of the present law in certain other provisions of the act, notably 1(1) (a) and 15(4).* The application of this definition of control will in most cases be in connection with the use in the sections to which it applies of the phrase 'controlling, controlled by, or under common control with' a carrier. This phrase has been used because it recently had the benefit of interpretation by the Supreme Court in the case of *Rochester Telephone Corporation v. United States* * * *." (Emphasis supplied.)

The question, then, is what was the interpretation of the word "control" as used in Section 15(4) so approved by Congress. *

This question is answered by the decisions of the Commission wherein it was exercising its power under Section 15(1) to establish reasonable rates and its decisions under Section 15(4). Consistency in the administration of the act requires that the phrase "common management or control" be given the same meaning in the administration of both sub-sections of Section 15.

The question has arisen most frequently in cases where the Commission was prescribing rates in exercise of its power under Section 15(1) wherein the Commission has had to deal with the problem whether for particular lines of railroad its prescribed single-line or joint-line scales should apply and whether for certain lines arbitraries or differentially higher rates should be permitted.

*Since the question is what interpretation was given by the Commission to the phrase "common management or control" prior to the Transportation Act of 1940, we have noted the date of each Commission decision cited in the discussion which follows.

The most usual occasion for considering whether Commission-established differentially higher rates should be permitted in connection with particular lines arises where rates of so-called short or weak lines of railroad are involved. See, for example, *North Carolina State Highway Commission v. Norfolk & Western Ry. Co.*, 153 I.C.C. 29, 31 (1929), where special treatment of the Norfolk & Southern was permitted, and *Rate Structure Investigation, Part 13, Salt*, 197 I.C.C. 159 (1933), where the Commission said at pages 181-182:

> "It has been the almost uniform practice to give all of these lines *other than those under common management or control with some standard carrier*, arbitraries in addition to the scales prescribed for general application, and the same course is here warranted." (Emphasis supplied.)

As indicated earlier, the reason for this "almost uniform practice" of according more liberal treatment to independent, short and weak lines as compared with similar lines under common management or control with a standard carrier, is stated by the Commission in *Livestock, To, From, and Between Points in the Southeast*, 101 I.C.C. 105 (1925), where the Commission said at page 107:

> "* * * we have almost invariably required lines under a common management or control to apply the single-line rates. *These decisions were based on the fact that such management and control resulted in certain benefits in operation* and on our opinion that single-line rates would be reasonable for application over such lines." (Emphasis supplied.)

To the same effect is the Commission's statement in *Southern Class Rate Investigation*, 100 I.C.C. 513 (1925), where, after prescribing certain arbitraries for short or weak lines, the Commission said at page 654:

> "Lines under *common control or management* with standard lines are excepted from the above finding because no good reason appears for treating them any differently than branch lines, that being their real status." (Emphasis supplied.)

See also *Torrea Packing Co. v. Asphalt Belt Ry. Co.*, 204 I.C.C. 482, 483 (1934), and *Livestock To, From, and Between Points in Southeast*, 91 I.C.C. 292 (1924), which quoted from *United States War Dept. v. A. & S. Ry. Co.*, 83 I.C.C. 742, 745 (1923), as follows:

> "Defendants, whatever their strict legal relations, certainly benefit in operation from their *common control and their interlocked management* and they are advertised to the public as a single unified system." (Emphasis supplied.)

The leading Commission case on what constitutes common management or control and the extent of such control for determining whether joint-line or single-line rates should be applied is the frequently cited case of *Blackshear Mfg. Company v. Atlantic Coast Line R. Co.*, 87 I.C.C. 654 (1924), cited in the Commission's report in this case (R. 101). In that case the Commission prescribed two distance scales, one a single-line scale for application over a single line of railroad "or over two or more lines under the same general management or control," and the other a joint-line scale which applied "only when the lines embraced in the route are not under common management and control." The Commission, at page 664, explained this phraseology in the following passage:

> "It should be understood that where the term 'carriers under the same management and control' is used in this report, it refers to carriers generally controlled

through ownership, lease, or otherwise *to the extent of controlling traffic policy,* even though separate corporate entity may be maintained." (Emphasis supplied.)

This definition has been cited and consistently followed by the Commission in such later joint-scale cases as *Livestock To, From, and Between Points in Southeast,* 91 I.C.C. 292 (1924); *Raleigh Freight Traffic Bureau v. A.C.R. Co.,* 107 I.C.C. 156 (1926); *Justice Co. v. Holton Interurban Ry. Co.,* 153 I.C.C. 673 (1929), and *Humbard Construction Co. v. Southern Ry. Co.,* 161 I.C.C. 38 (1930). In *Rates on Chert, Clay, Sand and Gravel Within Georgia,* 197 I.C.C. 215 (1933), the Commission stated that the definition in the *Blackshear* case "had been followed in subsequent cases."

The *Blackshear* case was not a Section 15(4) case, but the definition of common management or control in that case has been applied by the Commission in cases involving the application of that language as contained in Section 15(4). *Ala., Tenn. & Nor. Corp. v. Southern Ry. Co.,* 148 I.C.C. 708 (1928); *Georgia & F. R. v. Atlantic Coast Line R. Co.,* 191 I.C.C. 489 (1933); *Seaboard Air Lines Ry. Recs. v. Carolina & Northwestern Ry. Co.,* 204 I.C.C. 416 (1934).

This use by the Commission of the same test, that is, control of traffic policy, in defining the phrase "common management or control" in both rate-making cases and Section 15(4) cases was essential to consistency in the administration of the act. To construe the phrase in Section 15(4) cases in a manner different from the construction of the phrase in rate-making cases would inequitably deprive lines found to be under common management or control, for rate-making purposes, of the very operational benefits of system operation which the Commission has held to be a justification for denying them higher rate scales or arbitraries.

Counsel for the Milwaukee (Milw. Br. 33-34) assert that the Commission, prior to 1940, had abandoned the control of the traffic policy test stated in the *Blackshear* decision and that the *Blackshear* case "has been laid to rest." They cite two decisions, *Birmingham Slag Co. v. Blue Ridge R. Co.*, 200 I.C.C. 554 (1934) and *Dublin & Laurens County C. of C. v. Macon D. & S. R. Co.*, 234 I.C.C 415 (1939).

In the *Birmingham Slag* case the Commission found that the Southern and the Blue Ridge were operating under common management or control. To support this conclusion, the Commission first cited *Humbard Construction Co. v. Southern Ry. Co.*, 161 I.C.C. 38, which, at page 40, cited and quoted with approval the *Blackshear* case. The Commission likewise cited *Hiddenite Granite Co. v. Yadkin R. Co.*, 192 I.C.C. 389, which, in turn, cited and quoted with approval the language of the *Blackshear* case, as contained in the *Humbard* decision. Thus, the *Birmingham Slag* case was based upon the application of the *Blackshear* rule and was no departure therefrom.

In the *Dublin & Laurens County* case, the Commission found that the Macon was under common management or control with the Seaboard. The majority opinion recited that the chief traffic officer of the Seaboard was the chief traffic officer of the Macon and represented both carriers as members of the Southern Freight Association. The majority proceeded:

> "The only employees of the Macon who may be classed as executives who are not also officers of Seaboard are the general manager and traffic manager, *who are subordinates of executives of Seaboard and who exercise very limited authority and have no control of policy matters.*" (Emphasis supplied.)

Thus, it appears that the individual who was the traffic manager of the Macon was the subordinate of the individual who was the chief traffic officer of both the Macon and the Southern, and that the traffic manager of the Macon was one of the subordinates "who exercised very limited authority and have no independent control of policy matters." The fact that the control of traffic policy of the Macon was in the hands of the individual who was chief traffic officer of both of the companies, supports a finding under the *Blackshear* rule that the traffic policy of the Macon was controlled by Seaboard. Counsel for the Milwaukee rely upon the dissenting opinion of Commissioner Porter. The dissent indicates that Commissioner Porter differed from his colleagues of the majority only to the extent that he would have arrived at a different conclusion of fact as to where the control of traffic policy of the Macon rested. Again, this decision does not indicate any departure by the Commission from the *Blackshear* rule.

Thus far we have cited no cases of the Commission involving the ownership by two otherwise competing carriers of a single subsidiary.

In rate-making cases the Commission has held on numerous occasions that a subsidiary company owned by two proprietary lines shall be considered as a part of each of the parent lines for rate-making purposes.

In *Pacific Lumber Co. v. Northwestern Pacific R. Co.*, 51 I.C.C. 738 (1918), the Commission held that the Northwestern Pacific, owned jointly by the Southern Pacific and the Santa Fe, "must be considered a part of those systems rather than an independent line" based on the finding that "that line is owned and controlled by the Southern Pacific and Santa Fe * * *." The Commission, in reaching that con-

clusion, relied on the decision of this Court in *Chicago, Milwaukee and St. Paul R. Co. v. Minneapolis Civic & Commerce Association*, 247 U.S. 490, cited above.

The case of *Des Moines Union Railway Switching*, 231 I.C.C. 631 (1939), involved a subsidiary equally owned by the Milwaukee and the Wabash. Again relying on the *Minneapolis Civic & Commerce Association* case, the Commission treated the subsidiary as a part of each of the two proprietary lines.

The Oregon, California & Eastern, which is jointly owned by the Great Northern and Southern Pacific (*Construction of Railroad Lines in Eastern Oregon*, 138 I.C.C. 99, 107 (1928)), has been treated for rate-making purposes in connection with hauls over the Southern Pacific to San Francisco as a part of the Southern Pacific. *Roth Blum Packing Co. v. Southern Pacific Co.*, 204 I.C.C. 93 (1934).

There are seven Commission decisions specifically holding that the SP&S is to be treated as a part of the systems of the two Northern Lines rather than as an independent line.

The first of these cases was *Portland Chamber of Commerce v. O.R.R.&N.Co.*, 19 I.C.C. 265, decided June 7, 1910, a little over one year after the SP&S was placed in operation. At page 283 the Commission said:

> "So far as these proceedings are concerned, we believe this road [SP&S] must properly be considered a part of the Northern Pacific and Great Northern systems rather than as an independent line. It is used by the Great Northern and Northern Pacific in the transportation of all business between coast and interior points which can be handled more cheaply over it than over the existing lines of the Great Northern or Northern Pacific."

The later cases wherein the Commission took the same position are *City of Astoria v. SP&S.*, 38 I.C.C. 16 (1916); *Inland Empire Shippers League v. Director General*, 59 I.C.C. 321, 341 (1920); *West Coast Lumbermen's Association v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 129 I.C.C. 363 (1927); *Spokane, Portland and Seattle Railway Company and Oregon Trunk*, 41 I.C.C. Valuation Reports 1 (1932); *Pillsbury-Astoria Flour Mills Co. v. Great Northern Railway Company*, 198 I.C.C. 642 (1934), and *Helix Milling Co., Inc. v. Great Northern Railway Company*, 287 I.C.C. 77 (1952).

It should be noted that of the cases last cited, all except the *Helix Milling Company* case were decided prior to the 1940 amendment of Section 15(4).

The lower court in concluding its review of Commission decisions prior to 1940, and after citing many of the cases cited in the preceding discussion, stated as follows:

> "The holdings in the above-cited Interstate Commerce Commission decisions can be summarized as follows:
>
> "1. Control of traffic policy is tantamount to management or control in *rate cases*.
>
> "2. Two competitive railroads can jointly manage and control a third railroad by controlling traffic policy insofar as *rate cases* are concerned.
>
> "3. Control of traffic policy is also used as the definition of management or control in Section 15(4) cases." (Emphasis the court's.) (R. 166.)

The Court went on to state that prior to 1940 both of the first two concepts had been applied in Section 15(1) cases but that only the traffic control concept had been applied in Section 15(4) cases. (R. 166-167.)

In stating that the joint management and control concept had not been applied in a case involving short-hauling, the

court overlooked the case of *West Coast Lumbermen's Association v. C.M.&St.P.Ry.Co.*, 129 I.C.C. 363 (1927). In that case complainant sought joint rates over routes which would short-haul the Great Northern and Northern Pacific in connection with the SP&S.

The Commission said, at page 364:

> "They [defendants other than the Soo Line, the Spokane International and the Canadian Pacific] urge that if joint rates are prescribed, they should be made applicable over routes via Dakota junctions. Over these routes the Northern Pacific, Great Northern and Chicago, Milwaukee and St. Paul would secure the long haul to which they assert they are entitled. The Spokane, Portland and Seattle is considered for rate-making purposes a part of the Northern Pacific and Great Northern. *Portland Chamber of Commerce v. O.R.R.&N. Co.*, 19 I.C.C. 265, 283."

Thus, as early as 1927, in a case involving the very carriers here involved, though the question was not squarely presented for determination, the Commission indicated that it would approve an application of Section 15(4) which would extend to two proprietary lines and a jointly owned subsidiary the protection of Section 15(4) against short-hauling. The cited case was a part of the body of Commission decisions interpreting Section 15(4) and approved by Congress upon re-enactment of Section 15(4) in the Transportation Act of 1940, with no change in the language here pertinent.

But accepting, arguendo, the statement of the lower court that the joint control concept had not been applied in a Section 15(4) case prior to 1940, the conclusion of the Commission and of the lower court that it should be so applied is nevertheless correct.

The traffic control concept has been applied in rate cases to treat a subsidiary whether owned by a single carrier or jointly by two carriers as a part of the parent or parents for rate-making purposes. This is a recognition of the benefits inherent in what is in effect system operation. See cases cited ante pages 36-37. As the lower court said:

> "If the long-haul of railroads in a joint management and control situation is not protected by Section 15(4), the very benefit which the Commission regards as preventing them from charging higher joint line scales or arbitraries, i.e., the economies of joint operation, will be taken from them. Clearly, such a result would be inconsistent." (R. 168.)

As Mr. Justice Frankfurter said in the passage quoted above (ante, p. 33) from his opinion in *Denver & Rio Grande Western R. Co. v. Union Pacific R. Co.*

> "Congress has emphatically made clear that in its view the national interest requires the protection of railroads against being short-hauled. * * * it is the duty of this court to apply the policy expressed by that section."

This was the position of the lower court in this case when it said:

> "The obvious purpose of Section 15(4) is to allow a carrier to protect its long-haul not only over its route but over that of a closely associated affiliate. The decision of the Commission is consistent with that purpose, and there is no sound reason, economic or otherwise, advanced why two joint carriers are not any less in need of long-haul protection than a single railroad which controls a subsidiary.
>
> "Section 15(4) contains a provision which nullifies the long haul protection normally afforded by the statute

when the Commission finds that through routes are needed in order to provide adequate and more efficient or more economical transportation. Thus, although no real reason has been put forward why joint ownership of a subsidiary plus long haul protection are inherently wrong, the Commission is always in a position by virtue of this exception to see that no one is prejudiced by such an arrangement." (R. 168-169.)

The application made by the Commission in this case of Section 15(4) is further supported by a consideration of the relationship between Sections 3(4) and 15(4). This point cannot be better expressed than was done by the lower court when it said as follows:

"Viewed in the light of this relationship between the two sections, the decision in *Louisville & Nash. R.R. Co. v. United States*, 242 U.S. 60, strongly supports the views of the Commission in the case at bar. In that decision which involved the use of switching facilities, the court was considering a question of discrimination under the forerunner of Section 3(4). In its opinion the court stated that if either of the joint owners of these switching facilities was the sole owner, discrimination would be impossible because the section as then constituted stated that the Act 'shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.' The court then ruled that '* * * what is true of one owner would be equally true of two joint owners, * * *.' It should be noticed that this statement was made even though the literal words of the section are singular in meaning.

"In the instant case there is also a situation presented where if there were only one owner there could be no possible discrimination. In the case at bar this is so because of the presence of Section 15(4). In the *Louis-*

ville case it resulted from the wording of the forerunner of Section 3(4). In other words, although the reasons for the impossibility of discrimination in a single owner situation are different, the result is still the same.

"Thus, if it could be said that the *Louisville* decision is controlling on the question of discrimination in the present case, which issue this court does not decide, however, it would seem to follow that the S.P.&S. is under the common management and control of the Northern Lines within the meaning of Section 15(4) because of the relationship between that statute and Section 3(4). It is obvious that these sections must be read together for any inconsistency between the two would be untenable." (R. 169-170.)

The application of Section 15(4) in this case so approved by the lower court is clearly required to conform to the national policy adopted by Congress, as evidenced by the legislative history of the section and is clearly warranted by the language of the section. The Commission's application has "a reasonable basis in law" within the meaning of the cases first cited in this subdivision. That being true "the judicial function is exhausted" and the conclusion of the lower court sustaining the Commission's interpretation of Section 15(4) must be affirmed.

Authorities cited by appellants are not opposed to the Commission's application of Section 15(4)

Counsel for appellants (Milw. Br. 27-30; Sec'y. Br. 57) cite three cases decided prior to 1940, wherein the Commission held that two or more common owners were not under common management or control with a jointly owned subsidiary to be entitled to protection against short-hauling

under Section 15(4). *Hughes Creek Coal Company v. K. & M. Ry. Co.*, 29 I.C.C. 671 (1914); *Absorption of Switching Charges*, 157 I.C.C. 129 (1929); and *Manufacturers Ry. Co. v. A.&W.Ry.Co.*, 172 I.C.C. 554.

These cases support only the proposition that the fact of common ownership standing alone is insufficient to support a finding of common management or control. Under the rule of the *Blackshear* case the controlling carrier or carriers must *exercise* control over the traffic policy of the controlled carrier. If such control of traffic policy is not exercised, common management or control does not exist, whatever may be the power of one or more carriers so to control another.

The first case cited is *Hughes Creek Coal Co. v. K.&M.Ry. Co.*, 29 I.C.C. 671. Of the 90,000 outstanding shares of the Kanawha & Michigan Railway, 40,265 were owned by the Chesapeake & Ohio and 40,271 were owned by Lake Shore & Michigan Southern. It was charged by the complainants that the Chesapeake & Ohio and the Kanawha & Michigan are practically one and that it was unjustly discriminatory for them to deny to K. & M. mines access to markets, which had been made available for C. & O. mines. The Commission found, in effect, that whatever may have been the power of the two carriers, the Chesapeake & Ohio and the Lake Shore, to exercise control over the K. & M., the control was not exercised. As the Commission said, at page 680, "such identity between the two roads as complainants assert is not proven." This case is no authority to support a conclusion that if two carriers, having the power to control, do in fact exercise that power, the two owning carriers and the subsidiary are not entitled to protection against short-hauling under Section 15(4).

The other two cases cited by appellants are *Absorption of Switching Charges*, 157 I.C.C. 129 (1929); and *Manufacturers Ry. Co. v. Ahnapee & W. Railway Co.*, 172 I.C.C. 554 (1931), both of which involve the Terminal Railroad Association of St. Louis "owned by 14 or 15 trunk lines." (157 I.C.C. at 130.)

In the first of these two cases the entire discussion of Section 15(4) is in the following passage:

> "Respondent also contends that disapproval of proposed changes would be in violation of Section 15(4) of the act, as it would permit traffic to move over protestant's line instead of the Terminal, in which respondent has a proprietary interest. The Terminal *is not operated* in conjunction and under common management or control with respondent, within the meaning of the provisions of Section 15."

Here again the power of actual control, if it existed, was not exercised. In the second of these two cases the only statement of facts relating to the management and control of the Terminal is at page 560 where the Commission said:

> "The Terminal is controlled by 15 connecting railroads through the ownership of one share each of its nontransferable stock under a collective management and control of a majority of them. * * * Each of the proprietary lines is represented on the board of directors and has one vote in the management and control of the Terminal. In addition to affording service to the proprietary lines, the Terminal affords service for 11 nonproprietary lines in the St. Louis-East St. Louis district, including the Manufacturers and Alton and Southern."

At page 564 the Commission stated that defendants in the cited case urged that the Terminal is operated in conjunction and under their common management and control with

the owners and therefore comes within the protection against short-hauling in Section 15(4) of the act. The Commission answered this contention by citing *Absorption of Switching Charges* and quoting the language which we have quoted above from that case.

These cases again are authority only for the proposition that, under the facts relating to the Terminal Railroad Association of St. Louis, common management or control, as that language is contained in Section 15(4), was not exercised by any single owner or any identifiable group of owners of the Terminal stock. They are not authority for the proposition that common management or control within the meaning of Section 15(4) cannot be exercised by several owners of a jointly owned subsidiary.

Furthermore, as recited by the Commission in the *Manufacturers Railway* case, the Terminal had been enjoined, in effect, from asserting a right under Section 15(4). At page 560 the Commission said:

> "The Terminal, although a common carrier, may not legally operate in all respects as a railroad transportation company, having been perpetually enjoined from operating otherwise than as a terminal and interchange facility for railroads. See *United States v. St. Louis Terminal*, 224 U.S. 383, and 236 U.S. 194. It was permitted to exist and continue as a lawful unification of terminal facilities for the interchange, collection and distribution of traffic *of all railroads desiring to use its facilities upon equal terms, regardless of whether they were or are proprietary or nonproprietary companies.*" (Emphasis supplied.)

Thus, the 15(4) issue in that case was moot because the Terminal had no right to protection against short-hauling in the light of the injunction.

Appellant Milwaukee would avoid the conclusion which we have just stated* by quoting the condition stated in the decision in 224 U.S. at page 412, reading as follows:

> "Seventh. To avoid any possible misapprehension, the decree should also contain a provision that nothing therein shall be taken to affect in anywise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Company, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such Commission."

To take away from the Terminal Association a right which it might otherwise have under Section 15(4), which is what the injunction did, is in no way a curtailment of the power of the Commission. Indeed, the effect of this curtailment of the rights of the Terminal was to broaden the power of the Commission and give to it power which it might not otherwise have under the act, to establish routes via the property of the Terminal.

In this same subdivision of the Milwaukee brief (Milw. Br. 27-30) counsel discuss two additional cases. *West Coast Lumbermen's Association v. S.P.&S. Railway Company*, 45 I.C.C. 230 (1917); and *West Coast Lumbermen's Association v. Chicago, Milwaukee and St. Paul Ry. Co.*, 129 I.C.C. 363.

We have already discussed the second of these cases (ante, p. 43) and have developed that rather than supporting the position of the appellants, it supports the position of these appellees that two owning carriers may so control a joint subsidiary that the two owners and the subsidiary are

*See brief for appellant Milwaukee in No. 306, in opposition to motions of appellees to affirm, at page 7.

entitled to the protection of the long-haul clause under Section 15(4).

The other case, *West Coast Lumbermen's Manufacturers Association v. Spokane, Portland and Seattle Railway Company*, 45 I.C.C 230, involved the cancellation by the SP&S of rates and the closing of through routes on lumber from origins on the SP&S via Portland, Oregon, and the Union Pacific beyond to points east of Denver. The Northern Lines were not parties. The Commission approved the cancellation of the rates based upon the fact that the route via Portland and Union Pacific deprived the SP&S of some 400 miles of haul between Portland and Spokane, to which the Commission held the SP&S was entitled under the short-hauling provisions of Section 15(4). As recited in the decision, there were routes via the SP&S to Spokane and thence beyond via the Northern Pacific, the Great Northern and the Milwaukee. The routes via the Milwaukee were not applicable to destinations between Denver and the Missouri River, the destination territory involved in the complaint. Since the SP&S was successful in retaining its own long-haul, there was no occasion for raising the issue whether the closing of the route in question would likewise retain to the Northern Lines their long hauls east of Spokane. It is important, however, to note that the effect of the closing by the SP&S of the Union Pacific route resulted in the preservation to the Northern Lines of their long hauls to the territory between Denver and the Missouri River. The table on page 232 of the Commission's decision shows that the routes which remained open to that territory involved hauls by the SP&S and thence by one of the Northern Lines to Billings, Montana, and via the Burlington beyond Billings. There was no issue raised in the case as to the right of the

Northern Lines to retain their long hauls on traffic interchanged with the SP&S under Section 15(4) of the act. The case is of no significance in the present controversy.

These authorities cited by appellants do not support a conclusion different from that of the Commission in this case. The lower court was correct in declining to rely on any of the cases cited as a basis for reversing the order of the Commission in this case. (R. 170.)

At page 43 counsel for the Milwaukee cite *Justice Co. v. Holton I.-U. Ry. Co.*, 153 I.C.C. 673. This again was a case wherein two owners, the Southern Pacific and an estate, of the stock of a subsidiary did not exercise the power which they may have had to control the traffic policy of the subsidiary and, as a consequence, the Southern Pacific, one of the owners, and the subsidiary were not treated as one line for rate-making purposes. The case is not opposed to the Commission's conclusion that if two carriers do exercise such control they are entitled to the protection of Section 15(4) against short hauling.

At page 43 of the Milwaukee brief, counsel assert that the Commission "has dealt a final blow to the theory of the District Court that rate-making cases and through route cases follow a uniform pattern," citing *Independent Paper Stock Co. v. C.&A.R.Co.*, 168 I.C.C. 404, 405. Therein the Commission stated that the Chicago & Alton and the Terminal Railway Association of St. Louis are treated as one line for rate-making purposes, and counsel argue that the Commission made this finding despite the fact that the Terminal and its owners are not under common management or control within the meaning of Section 15(4).

In the passage quoted above (ante, p. 49) from *Manufacturers' Ry. Co. v. Ahnapee & W.Ry.Co.*, 172 I.C.C. 554,

it appears that the Terminal was enjoined from asserting a right under Section 15(4), as a result of which all railroads, whether proprietary or nonproprietary, had the right to use the Terminal facilities. Thus, every user, whether proprietary or not, was necessarily considered as one line with the Terminal for rate-making purposes. Because of the situation peculiar to the Terminal, the Commission's statement in the *Independent Paper* case is of no significance in this case.

Counsel for the Milwaukee (Milw. Br. 34) argue that common management or control within the meaning of Section 15(4) can only exist when one railroad has stock control of another.

It is undoubtedly true that in the most usual case applying the *Blackshear* rule in Section 15(4) cases wherein it has been found that common management or control exists, the controlling carrier does own the controlling stock of the controlled carrier and the controlling carrier is able to control traffic policy by reason of the fact of that ownership. But under the *Blackshear* rule the control of traffic policy is the significant fact and, if that fact exists, it is not material whether the power to exercise that control results from "ownership, lease *or otherwise*." (Emphasis supplied.)

In rate-making cases ownership by one carrier of the stock of another is not alone sufficient to establish the fact of common management or control unless there is control of traffic policy. In *Bragg & Milsaps Co. v. Atlanta & West Point R. Co.*, 128 I.C.C. 238, the Commission said:

> "Defendants offer testimony by traffic officials that the traffic policy of Nashville, Chattanooga & St. Louis, Atlanta & West Point and Western Railway of Alabama was in no way dictated by the Louisville & Nashville,

and that the traffic policy of the Louisville and Nashville was not dictated by any officials of the other three carriers.

"Evidence of ownership by one carrier of shares of the capital stock of another, or of a majority of such shares, does not in and of itself warrant a finding that both carriers are under common management and control."

The Commission then cited in support of that statement the *Blackshear* case, quoting therefrom the test of control of traffic policy already quoted from the *Blackshear* case.

Appellants argue that the literal words of Section 15(4) are in the singular and contemplate only that the protection thereof against short hauling shall extend to "its railroad" and "any intermediate railroad" and does not extend to a case where two parents control a single subsidiary. But that same situation existed in the *Louisville & Nashville* case wherein, as the lower court has pointed out, the statement of the Court, "We conceive that what is true of one owner would be equally true of two joint owners," was made "even though the literal words of the section are singular in meaning." (R. 169.)

Furthermore, Section 15(4), with no change in the language of the paragraph, should be read to support the conclusion that two carriers may jointly manage and control a single subsidiary to entitle the subsidiary and the two owning carriers to the protection of Section 15(4) against short hauling. As applied in this case, Section 15(4) must be construed as indicated in the following:

"In establishing any such through route the Commission shall not (except as provided in Section 3 of this title, and except where one of the carriers is a water line) require any carrier by railroad [*that is, the SP&S*]

> without its consent to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad [*that is, either the Great Northern or Northern Pacific*] operated in conjunction and under a common management or control therewith [*that is, with the SP&S*] which lies between the termini of such proposed through route."

The phrase "any intermediate railroad" reasonably contemplates that there may be more than one intermediate railroad. The word "any" does not require the conclusion that there can be only one such intermediate railroad. The phrase "common management or control," as applied in all cases which have come before the Commission under Section 15 of the Act, contemplates that such control may be exercised by two carriers over a jointly owned subsidiary.

In a concluding section of the Milwaukee brief (Milw. Br. 51-56) and in a similar section of the Secretary's brief (Sec'y. Br. 59-61) on the subject of common management or control, counsel argue that common management or control of the SP&S by the Northern Lines does not in fact exist.

Counsel limit their discussion to a recitation of some, but by no means all, of the facts contained in the Commission's recitation of facts showing the extent of control of the SP&S by the two parent lines (R. 96-101). The conclusions which counsel would draw from these facts that common management or control does not exist necessarily rest upon the premise, which counsel seek to support, that two carriers owning equally the stock of a joint subsidiary cannot be said to control the subsidiary to entitle the subsidiary and the parent lines to the protection against short hauling under Section 15(4). This premise, we submit, is erroneous. Furthermore, their arguments are to the effect

that upon the basis of facts which they recite, the Commission should have reached the conclusion that such common management or control does not exist. Counsel do not attempt to show that upon the basis of all of the facts the Commission's conclusion was not supported by substantial evidence.

Admittedly, control of the SP&S by each of the two parent companies, each owning 50 per cent of the SP&S stock, is equal and joint and action can be taken only if both concur.

The interests of the two Northern Lines in the SP&S is closely analogous to a partnership. In every partnership, with each of two partners having equal interests, there is a possibility of dissension but self-interest of each partner in achieving the objects of partnership leads to a resolution of differences to avoid disruption or destruction of the joint enterprise. As long as the primary objectives of the partnership are in the interests of each partner, the two partners usually resolve their differences and the control of the enterprise by both continues. That is the fact in this case and the possibility of dissension which has not arisen cannot negative the fact that the two Northern Lines are in common management or control of the affairs of the SP&S. Witness Macfarlane, President of the Northern Pacific, could recall no instance when the parent lines took directly opposing positions. He said:

> "Mr. John Budd [President of the Great Northern] and myself have always been able to come to a quick and easy agreement as to what is best for the owners." (R. 2028.)

In the conduct of business of a partnership wherein the interests of two partners are equal, if one partner proposes certain conduct and the other partner declines to approve,

the result necessarily is that the proposal by the first partner is not adopted. That does not indicate, however, that there is any dissension in the partnership or that both of the partners do not continue to control the partnership business.

It is a fundamental principle of partnership law that "the good faith of partners is pledged mutually to each other that the business will be conducted with their actual interposition so that each may see that the other is carrying it on for their mutual advantage." Therefore, subject, of course, to their right to make an agreement otherwise, each partner "may take part in the management of the business." *Lindley on Partnership,* 11th ed. p. 387.* An incident to equality of management and control is the equal right to veto or forbid change. In that respect:

> "* * * Regard must be had to the state of things actually existing, for, as a rule, if the partners are equally divided, those who forbid a change must have their way." (Id. 403.)

In considering "the state of things actually existing," the following language in the Commission's report (R. 107) is particularly significant:

> "One fact stands out in this proceeding, namely, that it has always been the policy of the northern lines to preserve to themselves the long hauls on traffic originating or terminating on the S.P.&S. There is nothing of record to indicate that they have ever disagreed as to this. The considerations which led the northern lines into that policy determination are immaterial so long as the S.P.&S. has no choice except to follow directions."

We cannot leave this subject without a reference to the paragraph in the Milwaukee's brief at the bottom of page

*See to the same effect Section 18(e) of the Uniform Partnership Act.

51, wherein counsel would leave the impression that the SP&S has been a very profitable enterprise for the Northern Lines. Counsel say:

> "From their investments totaling $76,403,278, the Northern Lines have collected interest of $48,027,161, leaving a net cash outlay of $28,396,117."

These figures quoted by counsel are from Exhibit 45, witness Albertson, not in the printed record. The amount of interest stated was paid over the 43-year period from 1911 to 1954, and for that 43 years amounts on the average to $1,116,911 per year. That figure in turn represents a return of 1.46 per cent per year on the cash of $76,403,278 advanced by the Northern Lines. Counsel adds:

> "To this generous return may be added $21,959,415 per year freight revenues from SP&S traffic handled by the Northern Lines." (R. 121.)

That is the gross revenue received by the Northern Lines for handling business interchanged with the SP&S. After payment by the Northern Lines of their expenses of handling the traffic, the net return is obviously much less. However, that figure does well illustrate the point made in our opening statement that the purpose of the parent lines in promoting the SP&S System was to obtain a feeder line which would originate or terminate traffic handled by the Northern Lines in long haul. Obviously, there was no expectation on the part of the Northern Lines that the SP&S, considered by itself, would ever be a profitable investment.

It is this traffic interchanged with the Northern Lines, to obtain which they provided the money to build the SP&S and from which they derive substantially the only advantage which has accrued to them from their investment, that the

Milwaukee wants to be able to solicit on a parity with the Northern Lines.

Conclusion—Common Management or Control

When the SP&S was in the promotional stage, there were three possible alternatives, as follows:

1. Each of the two Northern Lines could have constructed separate railroads from Spokane into the territory served by the SP&S.

2. The Northern Lines could have combined to construct a joint facility owned as tenants in common over which each of the two Northern Lines would operate separately.

3. They could have organized, as they did, a separate corporation owned equally by each to build the facility for the common benefit of the two owners.

If either of the first two alternatives had been adopted, there can be no question but that the Northern Lines, operating directly over the properties now owned by the SP&S, would be entitled to retain their long hauls under Section 15(4) of the act. Both of the two alternatives would have been most uneconomical. Two railroads where one was sufficient could not be justified. Separate operation over a joint facility with duplication of train service could not be justified. The third alternative, which was adopted, was obviously the most economical. Because they adopted this most economical alternative, the appellants now assert that they are deprived of the protection of Section 15(4) against short hauling, based, we submit, on a most artificial interpretation of Section 15(4).

Based upon the authorities which we have cited and the facts as stated by the Commission in its report, we submit that the Commission was warranted in concluding that the

Northern Lines and the SP&S are operated under a common management or control within the meaning of Section 15(4) of the act and that the Commission properly concluded that the short-hauling provisions of that section entitled the two owning companies and the subsidiary to retain their long hauls. We submit further that the judgment of the District Court affirming the Commission in that respect must be affirmed.

III. The District Court correctly sustained the Commission's findings under Section 15(3) and the second exception in 15(4), as supported by substantial evidence.

The third issue, as the case was presented to the District Court, raised the question of the correctness of the Commission's finding reading as follows:

> "3. That it is not shown to be necessary or desirable in the public interest, in order to provide adequate and more efficient or more economical transportation, to require the establishment of through routes and joint rates in connection with the SP&S system and the Milwaukee and its connections via Spokane, the same as apply in connection with the SP&S system and the northern lines and their connections via Spokane." (R. 142.)

The District Court concluded that the finding was "supported by substantial evidence, and, thus, should not be disturbed." (R. 170.)

The quoted finding should be read in the light of the Commission's comments. (R. 107.) The Commission having found "that the S.P.&S. System lines are operated in conjunction with and under a common management and control

with the northern lines" within the meaning of Section 15(4), stated as follows:

> "It follows that any order requiring the establishment of routes in connection with the Milwaukee and the S.P.&S. via Spokane, and joint rates thereover, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, *and* are needed in order to provide adequate, and more efficient or more economic, transportation * * * That issue falls within the limitations of section 15(3) and (4)." (Emphasis supplied.) (R. 107.)

The phrase preceding the italicized conjunction is from Section 15(3). The phrase following the conjunction is from exception (b) of 15(4).

It follows that the finding first above quoted (R. 142) must be read similarly in the conjunctive and that such finding is then a finding that the through routes sought are not "necessary or desirable in the public interest" within the meaning of Section 15(3) and, moreover, are not required "in order to provide adequate, and more efficient or more economic, transportation" within exception (b) in Section 15(4).

Counsel for the Milwaukee first quote from the proposed report of the examiner, wherein the examiner stated conclusions which were overruled by the Commission in the final report of the Commission. For the most part, the discussion which follows in the Milwaukee brief. (Milw. Br. 78 et seq.) is a summary, and a very inadequate summary, of the evidence before the Commission presented by the Milwaukee's own witnesses and witnesses who supported the complaint, relating to specific commodities. The brief of the Secretary relating to specific commodities is even more superficial.

No attempt is made in either brief to summarize evidence which would support conclusions different from those which might be drawn from complainant's testimony standing alone or of the cross-examination of complainant's witnesses which would compel conclusions differing from those which counsel draw from their direct examination.

Since the question now before the Court is whether the lower court was correct in its conclusion that the Commission's findings were supported by substantial evidence, the Commission and the lower court cannot be reversed without a review of all the evidence bearing on their findings considered by the Commission. It would unduly extend this brief were we to make such a complete summary. The brief of these appellees in the lower court did undertake to make such a summary for the assistance of the court. It will be sufficient here, we believe, to support the conclusion of the lower court to refer to some of the evidence before the Commission, ignored by appellants, which supports the conclusions of the Commission and the lower court.

Forest Products

In considering appellants' arguments concerning the need for routes on lumber and forest products, the court should have in mind two facts, one, that there are many routes available to the lumber shippers from Pacific Northwest territory, and the other, that the timber dependent upon the SP&S for rail transportation is a very small portion of the total timber in the area.

The routes available are described by the Commission as follows:

> "As indicated in footnote 5, *supra*, a full line of joint through rates on these products from all points on the

S.P.&S. to all local and some common points on the Milwaukee east of Spokane have been established or approved for application via Spokane. Joint through rates apply from S.P.&S. origins to destinations on the Milwaukee in Wisconsin, Illinois, Indiana, Missouri, substantially all of Iowa, and parts of Minnesota over routes via Spokane, thence either of the northern lines to the Twin Cities, and the Milwaukee beyond. Many of the origins served by the S.P.&S. system are also served by either the Union Pacific or the Southern Pacific and from these origins joint rates apply via Marengo to most destinations on the Milwaukee and over lake routes beyond to destinations in official territory. In addition, from origins on the Union Pacific and Southern Pacific which, as indicated, include a large number of points on the S.P.&S. system, through routes and joint rates apply to substantially all points in the United States over the Union Pacific to Omaha, or over the Southern Pacific via Portland or Ogden and the Union Pacific, or over the Southern Pacific via El Paso, Tex., and connections beyond." (R. 139-140)

The timber resources in Oregon which can be served by the principal carriers are divided as follows:

Carrier	Without Competition	Competitive	Total
SP&S System	2.41%	15.29%	17.70%
Southern Pacific	65.16	16.58	81.74
Union Pacific	10.43	12.61	23.04

(R. 2103.)

Thus, only 2.41 per cent of Oregon timber is dependent on the SP&S for rail transportation and 97.59 per cent can be served by one or more of the other carriers. In the light of the overwhelming predominance of the Southern Pacific with respect to access to timber in Oregon, the routes via the Southern Pacific direct and in connection with the

Union Pacific and the Milwaukee are most significant. Even as to the 2.41 % dependent on the SP&S for rail transportation, joint rates over through routes are available via Spokane to Milwaukee local points and some common points.

Counsel for the Milwaukee, at pages 84 and 85, include a quotation from the Commission's report of the abstract of certain evidence before the Commission. That is an abstract of the testimony of witness R. T. Titus, Executive Vice President of Western Forest Industries Association (R. 716-721), who testified in support of the complaint. Titus likewise appeared before the Commission in *Denver & Rio Grande Western R. Co. v. Union Pacific R. Co.*, 287 I.C.C. 611, 612. It is to be recalled that in the *Rio Grande* case it appeared that there were through routes on lumber from origins on the Union Pacific via the Rio Grande to local points on the Rio Grande. (Id. 646.) A summary of the testimony of witnesses who asserted in that case that the existing routes to Rio Grande local points were not sufficient to take care of the needs of the lumber shippers appears in the Commission's report at pages 646 and 647. A comparison of that statement in the *Rio Grande* case with the Commission's summary of the Titus testimony in this case (R. 123-125) and the very brief summary (Milw. Br. 78-84) of the testimony of others who testified for the Milwaukee as to lumber routes, shows that the contentions made in the two cases by the complainants and their supporters were practically the same. In the *Rio Grande* case the Commission declined to grant the request of the Rio Grande for additional through routes on lumber to apply not only to Rio Grande local points but to points beyond the eastern termini of the Rio Grande on its connections. The order of the Commission declining that relief was sus-

tained by this court in *Denver & Rio Grande Western R. Co. v. Union Pacific R. Co.*, 351 U.S. 321.

It is significant that counsel for the Milwaukee do not mention this disposition by the Commission of the request for lumber routes in the *Rio Grande* case but instead seek to have this court reverse the Commission with respect to lumber routes by a showing of the comments by the Commission in that case on the need for routes on fresh fruits and vegetables. (Milw. Br. 85.) The *Rio Grande* case, of course, insofar as it relates to routes on lumber, is directly opposed to the position the Milwaukee here takes with respect to lumber routes.

The brief of the Secretary adds nothing to the argument of the Milwaukee on lumber routes. It is generally briefer and relies on the same points. (Sec'y. Br. 67-68.)

The Milwaukee in its discussion of lumber routes cites the testimony of several of the witnesses who testified in its favor. The abstract by counsel for the Milwaukee of that testimony is entirely inadequate and, indeed, inaccurate. To demonstrate this we will limit ourselves to a discussion of the evidence of two of those witnesses.

In a paragraph on page 80 counsel purport to summarize the testimony of a witness appearing for "a retail lumber company with 18 yards in Wisconsin." This was complainant's witness March, whose company operates 18 retail yards in eastern Wisconsin. (R. 797.) Of the 18 yards, nine are at stations served exclusively by the Milwaukee and an additional four are at stations served by the Milwaukee and also by the Soo Line or the Chicago and North Western, or both. (R. 797-798). The only complaint of this witness, as stated in his direct examination, is that if a car of lumber originates at an SP&S point, he is unable to move via the

Milwaukee east of Spokane and stop for completion of loading at the plant of St. Maries Lumber Company located on the Milwaukee at St. Maries, Idaho, to supply all of these yards. He has never done business with the plant at St. Maries. (R. 801-803.) Thirteen of his 18 yards are at points served by the Milwaukee. Joint through rates from SP&S points via Spokane and the Milwaukee are presently in effect to 10 of his 13 yard locations reached by the Milwaukee. (R. 809.) Thus, on shipments to 10 of his 18 yards he can now route from SP&S origins via the Milwaukee from Spokane, with the consequent right to stop in transit to complete loading at St. Maries. Only eight of his yards cannot now be supplied from SP&S local points with stops at St. Maries. Of a total of 150 cars received at the Wisconsin yards of this witness in 1953, 100 originated on the Southern Pacific or Union Pacific. All such cars could have been stopped at St. Maries to complete loading for termination at any one of his 18 yards under existing routes via Marengo, Washington. None was so stopped at St. Maries. Forty-five of the remaining cars originated on the SP&S System. Of these 45 cars, 30 terminated at yards of the witness local to the Milwaukee. Every one of those 30 cars could have been stopped at St. Maries to complete loading and could have moved to destinations under existing rate adjustments. None was so stopped. Within the pattern under which this witness now does business, he could utilize St. Maries to complete loading on approximately 90 per cent of his total receipts, yet he has not thus far stopped a single car to complete loading at that point. (R. 816-818.)

The abstract of testimony of this witness in the Milwaukee brief at page 80 would leave the impression that this witness is deprived by the absence of the SP&S-Milwaukee

route via Spokane of the use of St. Maries, Idaho, as a source of supply, but the true facts are that he could have used St. Maries as a source of 100 per cent of the business which St. Maries could supply and that on 90 per cent of his business he could have stopped at St. Maries to complete loading and moved to final destinations on the present through rates, but he did not do so for a single car. Clearly, counsel's abstract of testimony of this witness in no way supports the conclusion that the Commission's finding now complained of was not supported by substantial evidence.

We comment on the discussion by the Milwaukee (Milw. Br. 81) of the testimony of one additional witness to show how inadequate is the recitation by counsel of the facts and to show how far short counsel are of establishing that the entire record fails to contain substantial evidence to support the Commission's conclusion.

Counsel refer to the testimony of "a spokesman for seven operators of approximately 116 retail lumber yards located in North Dakota, South Dakota, Iowa, Minnesota, Montana, Nebraska and Wisconsin."

The testimony cited is that of witness Meyer, Traffic Manager of Northwestern Lumbermen's Association. (R. 827-828.) The association represents owners of some 2300 yards, but he appeared not for all members of the association but only for certain members "who have complained to us of the present condition as far as routing is concerned on shipments in connection with the various railroads." (R. 829.) Some of the complaints came to him by telephone and some by mail. (R. 837.) In response to our request for production of the complaints received by mail, he produced seven letters, which were all of the written complaints received by him. (R. 837.) The seven letters were later read

into the record. (R. 913-919.) One not familiar with the record in this case would have difficulty in identifying the 116 yards referred to by counsel, and counsel have made no effort to assist the Court in this respect. We are able to identify the yards. They are the yards of members of the association whose complaints to the witness were by mail in the seven letters. They are as follows:

Member	Address	Letter Dated	Number of Yards	Record Page
Denniston & Partridge Lbr. Co.	Newton, Iowa	6/29/54	28	838,918
Standard Lbr. Co.	Winona, Minn.	8/27/54	71	838,918
Consumers Lbr. Co.	Spirit Lake, Iowa	6/25/54	4	838,913
E. W. Oates Lbr. Co.	Storm Lake, Iowa	7/1/54	2	838,915
Smith Lbr. Co.	Milford, Ia.	7/13/54	1	839,916
C. W. Chapman Lbr. Co.	Waterloo, Ia.	6/28/54	6	839,917
Hart Lumber Co.	Newton, Ia.	6/29/54	4	839,917
		Total	116	

The witness in his testimony gave only three reasons for his assertion that the routes on lumber from SP&S origins via Spokane and the Milwaukee would be desirable. His first two complaints were that at the time of his testimony rates from SP&S points did not apply to Milwaukee points west of Mobridge, South Dakota, between Mobridge and the Montana line, and that no rates apply from points on the Santiam Branch of the Oregon Electric to Milwaukee stations. (R. 829-832.) Both of these complaints were taken care of by subsequent publication by the SP&S and the Milwaukee of rates on lumber from all SP&S points, including the Santiam Branch, to all local points and some common points on the Milwaukee east of Spokane. (R. 90, note 5.)

His final complaint was that certain operators of yards local to the Milwaukee could not ship cars originating on the SP&S via the Milwaukee east of Spokane to part unload

at one yard and to carry the remainder of the load to another yard of the same company located at a point to which rates from the SP&S via Spokane and the Milwaukee did not apply. For the seven yard owners listed, the only example which the witness gave of this situation was one described for Standard Lumber Company. The witness stated that that company has yards at Montevideo, Minnesota, and at La-Crosse, Wisconsin, and under the present rate setup cannot stop an SP&S car for partial unloading at Montevideo to complete unloading at LaCrosse. (R. 831, 841.) The company has 71 or 72 yards. (R. 838.) The witness was unable to state how many of those yards were located on the Great Northern or the Northern Pacific. Only eight of those yards are located on the Milwaukee. (R. 841.) Without knowing the location of the yards served by the Milwaukee other than the yard at Montevideo, it is impossible to state what opportunity the shipper would have to partially unload a car at Montevideo for movement beyond to another Milwaukee station or to stop it at a Milwaukee station west of Montevideo for partial unloading to proceed to Montevideo to complete unloading. There is absolutely no evidence in the record that Standard Lumber Company has any difficulty in keeping all of its yards supplied under the present rate structure.

The seven written complaints from the owners of the 116 yards were read into the record. (R. 913 et seq.) The letter from Standard Lumber Company dated August 27, 1954, appears at page 918. In none of the seven letters, except that of Standard Lumber Company, is there any specific complaint made by the writer of the nature stated by the witness in his direct testimony. The letter of Standard Lumber Company, which is the only exception, specifically mentioned the absence of rates from the Santiam Branch discussed

by the witness but made no mention of the situation described by the witness with respect to part unloading at Montevideo and LaCrosse.

The obvious conclusion is that the statements of the witness on the subject of part unloading were nothing more than statements of the contents of tariffs and did not reflect statements of any of his members of any difficulties in the conduct of the business. This is confirmed by the witness's own statement on redirect examination when he testified as follows:

> "Q. So the factual statements made in your prepared statements as to what can be done by these organizations, is that information derived from your letter or subsequent investigation of the tariff?
>
> "A. That would be derived from my investigation of the tariff." (R. 929.)

This more complete summary of the testimony of only two of the Milwaukee witnesses demonstrates that the Commission had before it substantial evidence to support its conclusion that additional routes on lumber via Spokane and the Milwaukee are not needed and that the District Court was correct in so concluding.

In the Milwaukee brief, at page 70 in the portion devoted to the alleged violation of Section 3(1) of the act, counsel discuss the situation of the owner of the lumber mill at St. Maries, Idaho, a local point on the Milwaukee east of Spokane. Apparently counsel would rely on the same facts to support an assertion that the route requested is required under Section 15(3) because at page 79 of the brief counsel refer to "lumber mill operators in Idaho." The argument of the Milwaukee is generally that the mill operator at St. Maries needs the route on lumber from SP&S System origins

via the Milwaukee east of Spokane so that it can purchase part loads on the SP&S to move via St. Maries to stop to complete loading for shipments over the Milwaukee beyond to eastern markets.

In the first place, the practice of moving part loads from SP&S origins to complete loading at points east of Spokane is insignificant.

We do not know the extent to which the practice is used at St. Maries. Witness Pugh, President of St. Maries Lumber Company (R. 370), testifying for the complainant, on cross-examination said as follows:

> "Q. * * * How many cars did you stop at St. Maries in the past year to complete loading? Can you tell us?
> "A. No. I don't know." (R. 1539.)

These appellees presented data to show how insignificant the practice is. The data are shown in the following table:

From SP&S System points in 1953 handled East by	Total Carloads	Stopped to Complete Loading east of Spokane
Great Northern	16,146	14
Northern Pacific	15,682	4
Total	31,828	18

(R. 2730; 2809-2810; Exh. 127)

Thus, for the Northern Lines only 18 cars out of a total of 31,828, or .06 of 1 per cent, received from the SP&S were stopped east of Spokane to complete loading. If the Milwaukee's experience had been more favorable to its case, appellant had the opportunity to make that showing before the Commission.

From a rate and routing standpoint the mill at St. Maries is in the same position as 73 other pine mills at local points east of Spokane, Washington or Pendleton, Oregon, all but seven of which are located on the Northern Pacific, Great

Northern or Union Pacific. (Exs. 112 and 113.) None of the 73 mills at local points on any of the four lines has wide-open routing. Under present routes, considered in the light of the number of Union Pacific and Southern Pacific mills in Oregon and Washington from which shipments can be made with stops in transit at St. Maries, the mill at St. Maries is actually in a better position to handle part loads of lumber originating west of Spokane than are mills on the Great Northern or Northern Pacific east of Spokane. The total mills located in Oregon and Washington west of Spokane and west of Pendleton, Oregon, and the number of those mills served by either the Union Pacific or Southern Pacific are shown in the following table:

	Total Mills	Served by either or both Union Pacific and Southern Pacific
Washington—west of Spokane	159	62
Oregon—west of Pendleton	420	383
Total	579	445

(Exh. 112)

In addition to those mills served by the Union Pacific or Southern Pacific, the exhibit shows that 45 mills in Washington are at points served by the Milwaukee but not served by the Union Pacific and, of course, not served by the Southern Pacific, which does not reach into the state of Washington. Thus, there is a total of 490 mills (445 plus 45) in the two states from which lumber may be shipped via the Milwaukee direct or via the Union Pacific through Marengo, Washington, and thence Milwaukee with the privilege to stop at St. Maries to complete loading. This is 85 per cent of the total mills in both states. As contrasted with this, Exhibits 112 and 113 show that there are 121 mills served by the SP&S System. Of these only 44 are served

solely by the SP&S and not served by either the Union Pacific or Southern Pacific. The other 77 SP&S mills are served by the Union Pacific or Southern Pacific or both. The 44 mills served solely by the SP&S System constitute only 8 per cent of the total of 579 mills in the states of Oregon and Washington.

If the route via the Union Pacific and Marengo and the Milwaukee beyond is sufficient for the needs of St. Maries Lumber Company, then obviously with its ability to reach over that route 85 per cent of the mills in Oregon and Washington, it is under no serious handicap because it is unable to reach the 8 per cent of the mills served solely by the SP&S cars.

The testimony of witness Pugh clearly shows that there is no need for the SP&S route via the Milwaukee east of Spokane and that the Union Pacific route is entirely adequate. On cross-examination he testified as follows:

> "Q. What are the restriction on joint through rates via the Union Pacific? Do you know?
>
> "A. No, I don't. I don't believe there are any.
>
> * * * * *
>
> "Q. Certainly none that bother you in marketing your lumber transited at St. Maries?
>
> "A. Not so far." (R. 373-376.)

The Commission was correct in its ultimate conclusion that the situation at St. Maries, Idaho, does not require a finding that the additional route requested by the Milwaukee is necessary.

Grain

Under this heading counsel for the Milwaukee discuss westbound routes on corn from Middle West origin points

to the Pacific Northwest. Counsel first quote from the Commission's decision and then discuss the Commission's disposition of the matter in two short paragraphs. (Milw. Br. 86-88.) The Secretary's brief does not discuss corn routes.

Again counsel make no attempt to discuss the entire evidence in the record on this subject but limit their comments to discussion of evidence of their own witnesses.

Two witnesses testified for complainant before the Commission, Gee, a grain broker at Seattle (R. 693) and Moberg of the Omaha Grain Exchange. (R. 896.)

The Commission in the passage quoted by counsel discussed two existing through routes from the Middle West to the Pacific Northwest, one to destinations on the SP&S via the Milwaukee to Terry, Montana, and the Northern Pacific to Spokane and the SP&S beyond, and the other from origins on the Milwaukee which may move to Spokane and thence via Marengo and the Union Pacific. The SP&S traffic manager testified that in 1953 the SP&S System terminated 910 carloads of corn. All but 9 of those terminated at SP&S stations served by one or the other or both of the Southern Pacific and the Union Pacific and could have moved over the Milwaukee's long-haul route via Marengo, Washington, and the Union Pacific beyond. (R. 2556-2557.) Thus, only one per cent of SP&S terminations could not have moved over the Marengo route.

Implicit in questions of Gee and Moberg by counsel for the complainant before the Commission was the inference that some difficulty arises from the 6-cent tariff differential between the maximum 19½-cent inbound rate from country points to primary market allowed as a draw back over the Marengo route and the similar 25½-cent draw back applicable over the Terry, Montana, route. It is apparent that

this difference in draw back upon which counsel comment (Milw. Br. 88) is not considered a serious handicap by the two Milwaukee witnesses because neither of them was sufficiently familiar with the tariff provision to be able to comment upon it without coaching.

Gee erroneously stated that the draw back over the Marengo route from Sioux City to Portland is 26½ cents. (R. 697.) Following a recess he changed his testimony to state that the amount is 19½ cents (R. 700), but on cross-examination readily admitted that he was not sufficiently familiar with the tariff provision to comment upon it until it was called to his attention during recess. (R. 702.) Moberg erroneously stated that the draw back on South Dakota tonnage over the Marengo route is 25½ cents. (R. 885.) Upon Moberg's erroneous statement, complainant's counsel commented as follows:

> "Mr. Maguire: I think we will have another witness on that point. I don't think he gave the right answer on that." (R. 885.)

No other witness was called by complainant to discuss the point.

These appellees, as defendants before the Commission, called two witnesses, one Shaw (R. 1686), a Seattle grain dealer, who annually handles approximately a fifth of all corn marketed in the Pacific Northwest, and the other Hestmark, Traffic Manager of West Coast Grain Division of Archer-Daniels-Midland, which sells corn purchased through a Portland broker, who in turn purchases in the Middle West. (R. 1921.) Both witnesses stated that the existing routes are adequate for their purposes.

It is apparent, in the light of the testimony to which we have referred, that the Commission's finding that the addi-

tional routes requested by the Milwaukee on corn are not necessary is supported by substantial evidence and that the lower court was correct in affirming the Commission in that respect.

Fresh Fruits and Vegetables

The Milwaukee brief in its discussion of these commodities first quotes facts as recited by the Commission (R. 129-130) and criticizes the Commission's conclusions based thereon in two brief paragraphs. (Milw. Br. 88-90.)

Counsel first criticize the Commission saying that the Commission minimizes the importance of the fruit and vegetable supply in the SP&S territory by limiting its comparisons to production at points served exclusively by the SP&S. The Milwaukee brief includes a table to show also the production at all points served by the SP&S exclusively and in common with other carriers.

The table shown by the Milwaukee should be expanded to include a showing of the total production of products listed in the states of Oregon and Washington. This more complete showing is set forth in the following table:

	(1)	(2) All SP&S Stations		(3) Exclusive SP&S Stations	
Commodity	Carloads All Railroads	Carloads	%	Carloads	%
Apples	19,839	44	0.2	44	0.2
Cherries	1,179	14	1.2	0	0
Pears	9,265	244	2.6	244	2.6
Potatoes	18,513	3,257	17.6	0	0
Onions	3,997	109	2.7	0	0

(1) Carloads originating on all railroads in the states of Oregon and Washington. (R. 140.)
(2) Carloads originating at all stations served by the SP&S including stations served in common with carriers other than the SP&S. (Milw. Br. 90.)
(3) Carloads originating at stations served exclusively by the SP&S. (Milw. Br. 90, and R. 140.)

As shown in the table, the only commodity produced in any quantity at SP&S stations is the potato crop. Practically all of the potatoes which originate on the SP&S are from stations on the Oregon Trunk, all of which are served also by the Union Pacific. Of the potatoes shipped from those stations, 98 per cent moved to Pacific Coast states and only two per cent, the only traffic which is of concern to the Milwaukee, moved to eastern transcontinental destinations. Oregon potatoes are not competitive rate-wise with Idaho potatoes and those from the Red River Valley in Minnesota and North Dakota, which are on the market at the same time. (R. 2569-2573.)

It is obvious that this complete table supports the Commission's statement as follows:

> "The production of fruits and vegetables at points served exclusively by the SP&S is very small as compared with the total production in Oregon and Washington." (R. 140.)

The Commission could equally well have said that the production at all points served by the SP&S is very small as compared with the total production in the two states.

Only one witness testified for the Milwaukee as to routes on fresh fruit and vegetables from SP&S origins. That was witness Jaynes, representing a produce wholesaler with houses at Mitchell, South Dakota, and Sioux City, Iowa. (R. 652.)

The Commission, in the passage quoted by counsel (Milw. Br. 89), describes in particular an existing route available to that witness saying:

> "There is, however, a through route and joint rates from SP&S origins via Spokane, thence via the Northern Pacific to Jamestown, N. Dak., thence the line of Mid-

> land-Continental Railroad to Edgely, S. Dak. and the Milwaukee through Aberdeen to Mitchell and Sioux City, which is said to be as desirable in all respects as the route sought via Spokane, thence the Milwaukee." (R. 130.).

Counsel for the Milwaukee criticize this statement by stating:

> "* * * but they [defendant railroads] significantly made no attempt to compare the schedule of perishables over the suggested four-line route with that available over the two-line SP&S-Milwaukee route." (Milw. Br. 90.)

If the route via Jamestown and the Midland Continental were in any way unsatisfactory to meet the needs of this witness, the Milwaukee, before the Commission, was perfectly free to make a showing in that respect. The statement last quoted wherein counsel would thrust that burden upon these appellees comes with poor grace.

In the argument of counsel for the Milwaukee on the subject of lumber routes, they quote from the decision of the Commission in *Denver & Rio Grande Western R. Co. v. Union Pacific R. Co.*, 287 I.C.C. 611, 642, wherein the Commission set forth the needs of shippers for routes on fresh fruits and vegetables. In the Secretary's brief in this case the Secretary likewise cites the *Rio Grande* case. (Sec'y. Br. 71.) In the *Rio Grande* case the Commission ordered new through routes from Union Pacific origins via the Rio Grande on fresh fruit and vegetables and counsel for the Secretary criticize the Commission in this case because its report "does not adequately explain its failure to follow its prior decision with respect to the Ogden Gateway." (Sec'y. Br. 72.)

The fact that the commodity may have been the same in the two cases does not require that the conclusions of the

Commission with respect to the need for additional routes should be the same. The facts in the two cases are utterly different.

In the Pacific Northwest there is a vast territory served only by the Union Pacific. (Ex. 73) In the *Rio Grande* case, 351 U.S. 321, at page 324 this Court commented on this fact in the following passage:

> "The Union Pacific has used its *strategic position in the Northwest territory* in such a way that practically all traffic between the Northwest, Denver and points east and south of Denver goes over its lines." (Emphasis supplied.)

If fresh fruits and vegetables or other perishables from that area served by the Union Pacific are to be marketed along the Rio Grande, they must move over the Union Pacific from the entire fruit and vegetable producing area in eastern Oregon, southern Idaho, and southern Wyoming. The evidence in the *Rio Grande* case, as summarized by the Commission, from shippers and consumers of such commodities originating on the Union Pacific demonstrated that the production of those commodities in the Union Pacific territory is great. (287 I.C.C. 611, 642-643.) It may be that without the through routes on fresh fruits and vegetables and other perishables named by the Commission in its order in that case, the entire Rio Grande territory would be effectively foreclosed from procuring commodities of that nature from the vast territory served exclusively by the Union Pacific, and that fact was sufficient to support the order which the Commission made in that case. No such factual situation exists in this case. The production in the SP&S territory is so insignificant that the absence of rates via the Milwaukee does not preclude the shipper from obtaining

all the fruits and vegetables he may need from the Pacific Northwest, and even as to that insignificant production in the SP&S territory, the existing routes and particularly the route via Jamestown, North Dakota, and the Midland Continental, are sufficient for the purposes of the only witness who testified in this case with respect to these commodities.

We only add that it is further significant that no producer of fruits and vegetables in the territory served by the SP&S appeared to assert that any additional routes were required.

Furniture

Counsel for the Milwaukee, in their discussion of routes on furniture, again quote from the report of the Commission and proceed in one paragraph to argue that the SP&S-Milwaukee route is necessary for this commodity. (Milw. Br. 90-92.)

One witness testified for the Milwaukee as to this commodity, witness Selby of Seattle. His company is engaged in the business as a distributor of a limited line of furniture, including school, theater and church furniture and equipment. Its principal source of material is Menominee, Michigan. (R. 625-626.) His company engages in the business of shipping out carloads with stops en route for partial unloading. (R. 628.) The witness conceded that there were many situations in the Northwest in which he is unable to stop a car for part unloading on one railroad to complete unloading on another. Thus, he cannot stop at a local point on the Milwaukee in Montana to part unload and deliver the balance at a local point on the Great Northern in Montana, and he cannot stop to part unload at a local point on the Milwaukee in Montana and complete unloading at a

Northern Pacific point in Montana. (R. 630-631.) This, again, is an illustration of the practice of transcontinental lines, including the Milwaukee, serving the Pacific Northwest to join only in routes which will not short-haul them. The existence of this practice, as applied by the Milwaukee, was conceded by complainant's principal traffic witness. (R. 783.)

Exhibit 26 presented by this witness gives the detail of routing and stops for partial unloading of 35 cars shipped for the account of his company from Menominee, Michigan, into the Pacific Northwest from August 12, 1952, to November 11, 1954, which is representative of his business in the Pacific Northwest. (R. 1441-1442.) The exhibit shows that of the 35 cars included in the exhibit 15 were stopped for partial unloading or made empty at seven stations reached by the SP&S, but of the seven stations all but one were served in common with other railroads. Of those 15 cars only six were handled by SP&S lines and nine were handled to the common stations by one of the other lines serving the station.

The witness himself conceded that with the existing routes he can so arrange his part loads into SP&S territory so that he is able to get the benefit of a through rate on the entire contents of a car. (R. 632.)

This concession by complainant's own witness is, we believe, conclusive to show that the Commission's conclusion that additional routes were not necessary for furniture was supported by substantial evidence.

These appellees, defendants before the Commission, called as their witness L. M. MacPherson, Traffic Manager of American Seating Company of Grand Rapids, Michigan. His company manufactures public seating, including school desks, theater chairs, folding chairs, church pews and furni-

ture and transportation seating. (R. 1957.) He described the practice of his company of shipping part loads with stops for unloading, which is obviously the same as the practice described by witness Selby for the Milwaukee. (R. 1958.)

MacPherson stated categorically that the present routes available on such commodities to destinations on the SP&S are sufficient for his needs in serving those points and that the service which his company obtains to destinations on the SP&S in connection with the Great Northern and Northern Pacific is satisfactory to his company and that the additional route sought by the Milwaukee would not solve any problem that he might encounter in shipping to destinations on the SP&S. (R. 1961.)

The testimony of this witness further supports the conclusion that the Commission was correct in finding that additional routes were not necessary for furniture and that that finding is supported by substantial evidence.

Iron and Steel Grain Bins

Counsel for the Milwaukee, at page 92, quote the Commission's summary of evidence relating to rates and routes on this commodity. Following this, with no reference to the record, counsel, at page 94, proceed to recite facts which "naturally" are true and of which the "Commission is aware."

In particular, counsel cite nothing in the record to refute the Commission's finding reading at follows:

> "The defendants assert, and it is not denied by the complainant, that iron or steel may be routed into Sioux Falls over the Illinois Central or the Burlington-Great Northern, be fabricated thereat and reshipped

under the Milwaukee transit tariff to Pacific Coast destinations over the Milwaukee direct or over that carrier in connection with the Union Pacific and Southern Pacific, and many of the destinations on the latter two carriers are common with the SP&S" (R. 133);

or to the conclusion of the Commission as follows:

"Adequate routing also appears to be available in connection with westbound shipments of * * * grain bins." (R. 140.)

In this situation we submit that this Court cannot say that the conclusion of the Commission last quoted is not supported by substantial evidence.

Agricultural Implements

This commodity is discussed by counsel for the Milwaukee at page 95 in a single page with only one citation to the record and with all other statements of fact entirely unsupported by any reference to the record.

The only witness who testified for the Milwaukee on this subject was witness Bowman, Traffic Manager of J. I. Case Company, Racine, Wisconsin. (R. 887.)

This company engages in the practice of shipping cars billed for partial unloading en route. The tariffs permit three stops for partial unloading. (R. 889.)

The witness can ship from all of his midwestern plants on joint through rates via the railroad serving the plant to the Twin Cities, thence Great Northern or Northern Pacific to Spokane, and thence via the SP&S to all points on the SP&S System. Over these routes he can also ship to all destinations on the Great Northern and Northern Pacific in Montana, Idaho, Oregon and Washington. Likewise, he

can ship from all of his plants by the railroad serving the plants to Omaha, thence Union Pacific and Southern Pacific to reach all points on the Union Pacific and Southern Pacific in the states of Idaho, Oregon and Washington. From all points he can ship on joint rates via the Milwaukee to Marengo, Washington, and thence Union Pacific to reach all points on the Union Pacific and Southern Pacific in Oregon west of Marengo. (R. 960-961.)

In this situation, his company assembles orders in cars and so routes the cars that stops can be made at the desired points and still obtain the benefit of a joint through rate. (R. 911.) Thus, he can reach all points in the Pacific Northwest on all railroads, including the SP&S, at joint through rates if ordinary care is exercised in arranging the part loads in cars.

In the only instance in which he attempted to show any difficulty in reaching an SP&S point (that is, Clatskanie, Oregon, referred to by counsel, Milw. Br. 95), he was compelled, on cross-examination, to admit that the inability was the result of an error by someone in his organization. (R. 890-891, 1933-1936.)

The situation described by this witness is the same as that which was before the Commission in the *Rio Grande* case, 287 I.C.C. 611, 636, on the subject of farm machinery. The Commission in that case denied a request of the Rio Grande for the westbound route via the Rio Grande and the conclusion of the Commission was affirmed by this court in 351 U.S. 321.

The conclusion of the Commission in this case on a similar showing, affirmed by the District Court as supported by substantial evidence, must similarly be affirmed by this Court.

Livestock

As for other commodities, counsel first quote the Commission's summaries of evidence relating to livestock as it appears in the record at pages 133 to 135. (Milw. Br. 96-98.)

Complainant's witness Davin and witness Beilfus for interveners supporting the complaint described sheep raising and marketing practices. Davin is a sheep raiser near Washtucna, Washington, a station on the SP&S. (R. 426.) During the winter and early spring the sheep are fed on winter range. After lambing and when the winter ranges dry up sometime around the middle of May, the ewes and lambs are moved to summer ranges east of Spokane. When the lambs mature in late summer, they are marketed. (R. 426-428.)

Davin testified that because there are no joint through rates on lambs to Chicago via the SP&S to Spokane and Milwaukee east, with the privilege to graze in transit along the Milwaukee, if he should ship over the SP&S-Milwaukee route, the freight cost to Chicago exceeds by some $40 per car the freight cost over the SP&S-Great Northern route or the SP&S-Northern Pacific route over which there are joint through rates, ith privilege of grazing in transit. (R. 429-430.) This deffe ence in freight cost is the only fact stated by Davin, on which the Milwaukee could rest an argument that the additional route is necessary. There is no testimony by any witness that Davin ever made a shipment requiring this absorption of $40 per car.

The situation which Davin describes is common to all railroads serving the Northwest. A shipper on the Northern Pacific in Washington cannot ship east of Spokane via the Great Northern on a joint through rate to the East. Similarly, a shipper on the Great Northern in Washington cannot

ship via Spokane on the Northern Pacific to the East. Similarly, shippers from Union Pacific points cannot summer range on the Great Northern on a joint through rate. (R. 3660-3664.) This again is an illustration of the traffic policy of the northern transcontinental lines, including the Milwaukee, to retain to themselves the long haul. (R. 783).

If Davin obtained the route from his SP&S loading point via the Milwaukee, he would be in a position better than sheep raisers along the Great Northern and Northern Pacific in Washington. He would have the choice of three routes east of Spokane and could graze sheep in transit along the Milwaukee, the Great Northern and Northern Pacific. The shippers who winter range on the Great Northern and Northern Pacific have only one route on which they can graze in transit at a through rate to an eastern market. The Northern Pacific shipper is limited to graze along the Northern Pacific, the Great Northern shipper is limited to graze in transit along the Great Northern. (R. 2748.)

In any event, this $40 per car of which Davin speaks does not determine the location of his summer range.

Beilfus testified as follows:

> "Q. (By Mr. Torinus) Is the selection of summer range dependent to some extent upon the market which the shipper can reach when he ships beyond the summer range to a consuming point, or a purchasing point or a livestock market?
>
> "A. I would say no. I would say that his selection of a summer range is where he thinks he is going to produce the heaviest lambs or the best lambs." (R. 1133.)

Counsel (Milw. Br. 98-99) discuss rather extensively the availability of summer grazing areas served by the Milwaukee east of Spokane but make no reference as to what the

record shows as to areas available on other lines. There is adequate summer range along any one of the three railroads. Witness Dyke for the Milwaukee described summer ranges available on the Milwaukee. (R. 1051-1055.) Witness Hart for the Northern Pacific gave similar figures for unused grazing capacity along the Northern Pacific. (R. 2781-2783.) Beilfus testified that the grazing area at Ft. Browning, Montana, on the Great Northern could alone take care of all sheep coming from the SP&S. (R. 1119.)

The facts recited by the Commission to show the very limited extent to which sheep raisers avail themselves of the privilege of grazing in transit. (R. 134-135), which are not disputed by counsel, coupled with the admitted fact that the privilege of grazing in transit does not determine the selection by the shipper of a particular grazing area, demonstrates, we believe, that the Commission's conclusion that the additional route is not required for this commodity is clearly supported by substantial evidence.

Counsel discuss the rates on westbound movement of hogs from Sioux Falls, South Dakota, to the Pacific Northwest in a very brief paragraph. (Milw. Br. 99.) That discussion is clearly inadequate to refute the recitation of facts with respect to hogs made by the Commission (R. 135), which shows clearly that there is no need for the route which the Milwaukee seeks.

Conclusion on the Third Issue

This brief review of the evidence with respect to specific commodities establishes, we submit, that there was substantial evidence before the Commission to support its findings that it has not been shown that it is necessary or desirable

in the public interest within the meaning of Section 15(3) to require the establishment of the through routes sought by the Milwaukee and, further, that it has not been shown that the routes requested are needed in order "to provide adequate and more efficient or more economic, transportation" within the meaning of the second exception stated in Section 15(4) of the act. The District Court was correct in so concluding and in this respect the judgment of the District Court should be affirmed.

IV. The District Court correctly sustained the disposition by the Commission of appellants' contentions under Sections 3(1), 3(4) and 1(4).

The final issues as the case was presented to the District Court involved the disposition by the Commission of the questions before it under Sections 3(1), 3(4) and 1(4) of the act. (R. 156-157.) The District Court affirmed the Commission's conclusions under these sections as supported by substantial evidence. (R. 170.)

The issues under Section 3(1)

Section 3(1) makes it unlawful for a carrier "to make, give or cause any *undue or unreasonable* preference or advantage" to any person, locality or any particular description of traffic, or to subject any person, locality, or any particular description of traffic "*to any undue or unreasonable* prejudice or disadvantage." Not every preference or advantage or prejudice or disadvantage is unlawful. It is only "undue or unreasonable" preference or prejudice which is made unlawful and the determination of that fact is in the province only of the Commission. *Board of Trade v. United States*, 314 U.S.

534, 546; *Nashville Ry. v. Tennessee*, 262 U.S. 318, 323; *Manufacturers Ry. Co. v. United States*, 246 U.S. 457, 481.

If the Commission finds that there is such undue or unreasonable prejudice or disadvantage, the question may arise as to what carrier or carriers may be required to act to remove it. On the contrary, if the Commission makes a finding supported by substantial evidence that there is no such undue or unreasonable preference or prejudice, the question does not arise as to what carrier or carriers may be required to act.

In this case the Commission found as follows:

> "Moreover, the evidence before us is not convincing that any shipper or locality is disadvantaged by reason of the absence of the routes and rates sought in such a manner or to the extent necessary to support a finding of unlawfulness under section 3(1) of the act." (R. 141.)

This finding was repeated in substance when the Commission said as follows:

> "We conclude: * * *
>
> "2. That the failure and refusal of the S.P.&S. to join in the establishment of through routes and joint rates via Spokane in connection with the Milwaukee and its connections, the same as apply via Spokane in connection with the northern lines and their connections, does not result in * * * undue preference or prejudice between shippers or localities." (R. 141-142.)

The Milwaukee brief (67-73) discusses Section 3(1) only as it relates to eastbound lumber. In the Secretary's brief (62-73), the discussion of Section 3(1) is so interspersed with discussion of the asserted necessity for through routes under Section 15(3) that it is impossible to determine what shippers or what localities or what commodities the Secretary would contend are unduly prejudiced or preferred.

The evidence supporting the Commission's conclusion that additional routes are not necessary or desirable in the public interest, as discussed in Subdivision III of this argument, similarly supports its conclusion that no violation of Section 3(1) was established.

As to lumber routes, the Commission's decision in *Denver & Rio Grande Western R. Co. v. Union Pacific R. Co.*, 287 I.C.C. 611, 646, affirmed by this Court, (351 U.S. 321) supports the Commission's decision in this case. In the *Rio Grande* case it appeared that there were through routes on lumber from Union Pacific origins to local stations on the Rio Grande just as there are in this case through routes on lumber from SP&S System origins to local points on the Milwaukee east of Spokane. In the *Rio Grande* case testimony of witnesses supporting the complainant seeking additional routes on lumber, as summarized by the Commission (Id., 646), related to inability to ship via the Rio Grande with stops in transit for part unloading, storage, milling or treatment and reshipment to points east of the eastern termini of the Rio Grande and to alleged handicaps in diverting or reconsigning the carloads originally shipped to local points on the Rio Grande. In that case the Commission declined to make a finding of violation of Section 3(1) with respect to lumber. The decision in this case, which is to the same effect, is correct in the light of the similarity of contentions of those supporting the complainants in the two cases.

Counsel for the Milwaukee (Milw. Br. 71) cite *Preston-Shaffer Milling Co. v. Great Northern Ry. Co.*, 304 I.C.C. 491. In that case the Commission found that the refusal of the Great Northern to join in joint through rates on grain from points on the Great Northern in northern Montana via Milton-Freewater, Oregon, a point on the Union Pacific,

thence via the Union Pacific to Portland and the Southern Pacific to points south of Portland and to California, with milling in transit at Milton-Freewater, resulted in a violation of Section 3(1). The order of the Commission was affirmed in *Great Northern Ry. Co. v. United States*, 172 F. Supp. 705.* Whether or not the Commission was correct in concluding that an order could be directed against Great Northern to remove the prejudice, the case is no authority to support a finding of a Section 3(1) violation in this case with respect to any commodity and particularly as to lumber.

In the *Preston-Shaffer* case it was claimed that the mill at Milton-Freewater, to supply its flour market, required a particular species of spring wheat, 79 per cent of which was said to be produced in territory adjacent to the Great Northern in Montana. The factual situation with respect to lumber in this case is utterly different. As we have shown, only 2.41 per cent of the timber in Oregon is dependent upon the SP&S System for rail transportation and 97.59 per cent can be served by another carrier. Moreover, there are joint through rates on lumber via Spokane and the Milwaukee to Milwaukee local points and some common points.

In the circumstances of this case, in the light of the Commission's finding that the evidence is insufficient to support a finding of violation of Section 3(1), it is not necessary to discuss the authorities going to the question whether, had

*Great Northern appealed from the judgment and this Court noted probable jurisdiction (*Great Northern Ry. Co. v. United States*, 361 U.S. 860 (1959)). But, as the files of this Court show, the Commission then, upon consent of the parties, vacated its order against the Great Northern. Thereupon, after counsel's motion suggesting mootness, this Court vacated the judgment below and remanded the case with instructions to dismiss the complaint as moot (*Great Northern Ry. Co. v. United States*, 362 U.S. 939 (1960))

there been any such undue or unreasonable prejudice or disadvantage, an order could be made directing the SP&S to act to remove the prejudice or disadvantage.

The issues under Section 3(4)

Section 3(4) makes it unlawful for a carrier to discriminate in its rates, fares and charges between connecting lines.

The Commission made the following finding:

> "We further find that the SP&S is not unlawfully discriminating in its rates and charges between the northern lines and the Milwaukee." (R. 107.)

The Commission made the following further finding:

> "We conclude * * * 2. That the failure and refusal of the S.P.&S. to join in the establishment of through routes and joint rates via Spokane in connection with the Milwaukee and its connections, the same as apply via Spokane in connection with the northern lines and their connections, does not result in discrimination against the Milwaukee * * *." (R. 141-142.)

The District Court stated that plaintiff in the court below had conceded that there could be no violation of Section 3(4) if the defendant railroads are under common management or control within the meaning of Section 15(4). (R. 169.) This concession is, in substance, repeated in the Milwaukee brief at page 73.

This concession by the Milwaukee is inescapable. If mere retention of their long hauls by carriers under common management or control within the meaning of Section 15(4) constitutes discrimination against another connecting line in violation of Section 3(4), the protection afforded by Section 15(4) would be completely destroyed. One section of the act

cannot be construed to nullify another section. *Ex Parte Public Bank*, 278 U.S. 101, 104, *Joseph A. Goddard Realty Co. v. N.T.C. & St. L.R.Co.*, 229 I.C.C. 497, 503.

Only where carriers under common management or control in addition to the retention of their maximum hauls participate in joint through rates with some connecting carriers not under common management or control while refusing to participate in such joint through rates with other connections can there be a violation of Section 3(4). See *Western Pacific R. Co. v. Northwestern Pacific R. Co.*, 191 I.C.C. 127, 134.* Appellants do not charge that the SP&S and the Northern Lines join with any separately managed carrier in joint through rates while at the same time refusing to join in such rates with the Milwaukee.

Since the Commission correctly concluded that the SP&S and the Northern Lines are operated under common management or control and are entitled to the protection of Section 15(4) against short hauling, the refusal to join in such rates with the Milwaukee does not constitute a violation of Section 3(4).

The lower court was correct in concluding that the findings of the Commission under Section 3(4) are supported by substantial evidence and thus should not be disturbed. (R. 170.)

The Section 1(4) Issue

In the lower court the Milwaukee raised the question whether the refusal of the SP&S to participate in joint rates

*The cited case refers to Section 3(3). Prior to the Transportation Act of 1940, what is now Section 3(4) was designated Section 3(3) (54 Stat. 898, 903). Consequently, the citation of Section 3(3) in the case which was decided in 1933 refers to what is now Section 3(4) of the act.

with the Milwaukee and its connections violates Section 1(4) of the act. (R. 156-157.) The court held that the conclusion that there was no such violation was supported by substantial evidence and should not be disturbed. (R. 170.)

By Section 1(4) every common carrier is required to establish reasonable through routes and just and reasonable rates applicable thereto. Section 15(3) gives the Commission power to establish through routes shown to be necessary or desirable in the public interest if not voluntarily established, but this power is limited by the short-hauling restrictions of Section 15(4). Necessarily, if through routes are not necessary or desirable in the public interest under Section 15(3), the Commission may not require them. Moreover, if carriers are operating under common management or control and thus are entitled to the short-hauling protection of Section 15(4), the refusal to establish such routes is not a violation of Section 1(4).

This quite obvious conclusion was recognized by the Commission in *Lemon Cove-Woodlake Asso. v. A.T.&S.F. Ry. Co.*, 139 I.C.C. 239, wherein the Commission at page 245 said:

> "* * * the general provisions of Section 1(4), that carriers shall establish through routes and reasonable rates applicable thereto, are subordinate to the specific provisions of Section 15 for establishment of through routes and joint rates."

The cited case was quoted with approval and applied in *Western Pacific R. Co. v. Northwestern Pacific R. Co.*, 191 I.C.C. 127, 131.

This conclusion follows likewise from the decision in *Thompson v. United States*, 343 I.C.C. 549. Therein it appeared that the Missouri Pacific joined with the Burlington in rates on grain from origins on the Missouri Pacific to

Concordia, Kansas, and thence via the Burlington to points on that line short of Omaha. The court held that joint through rates to points on the Burlington short of Omaha were not evidence of the existence of a through route from Missouri Pacific origins to Concordia, Kansas, and thence over the Burlington to Omaha. The Court pointed out that a holding to the contrary would mean that compliance by the Missouri Pacific in joining in the rates to points short of Omaha in compliance with Section 1(4) would cause the Missouri Pacific to lose its right to serve Omaha via its own lines, the right guaranteed by Section 15(4). The converse of the rule applied by the Court is that if a carrier or a group of carriers under common management or control are entitled to the protection against short-hauling by the provisions of Section 15(4), the provisions of Section 1(4) cannot be applied to compel those carriers to surrender that right.

Since the Commission correctly determined that the requested routes are not required under the provisions of Section 15(3), as modified by the short-hauling restrictions of Section 15(4), it follows that the charge by the Milwaukee of violation of Section 1(4) cannot be sustained.

CONCLUSION

We submit that there is no merit in any of the points urged by appellants as a basis for reversal of the judgment of the District Court. The District Court correctly ruled against appellants on every ground asserted by them as showing error by the Commission.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX A.

Statutes Involved.

Section 1(4) of the Interstate Commerce Act, 49 U.S.C., Section 1(4):

"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 3(1) of the Interstate Commerce Act, 49 U.S.C., Section 3(1):

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gate-

way, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however*, That this paragraph, shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 3(4) of the Interstate Commerce Act, 49 U.S.C. Section 3(4):

"All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Section 15(1) of the Interstate Commerce Act, 49 U.S.C. Section 15(1):

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or with-

out any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15(3) of the Interstate Commerce Act, 49 U.S.C., Section 15(3):

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through

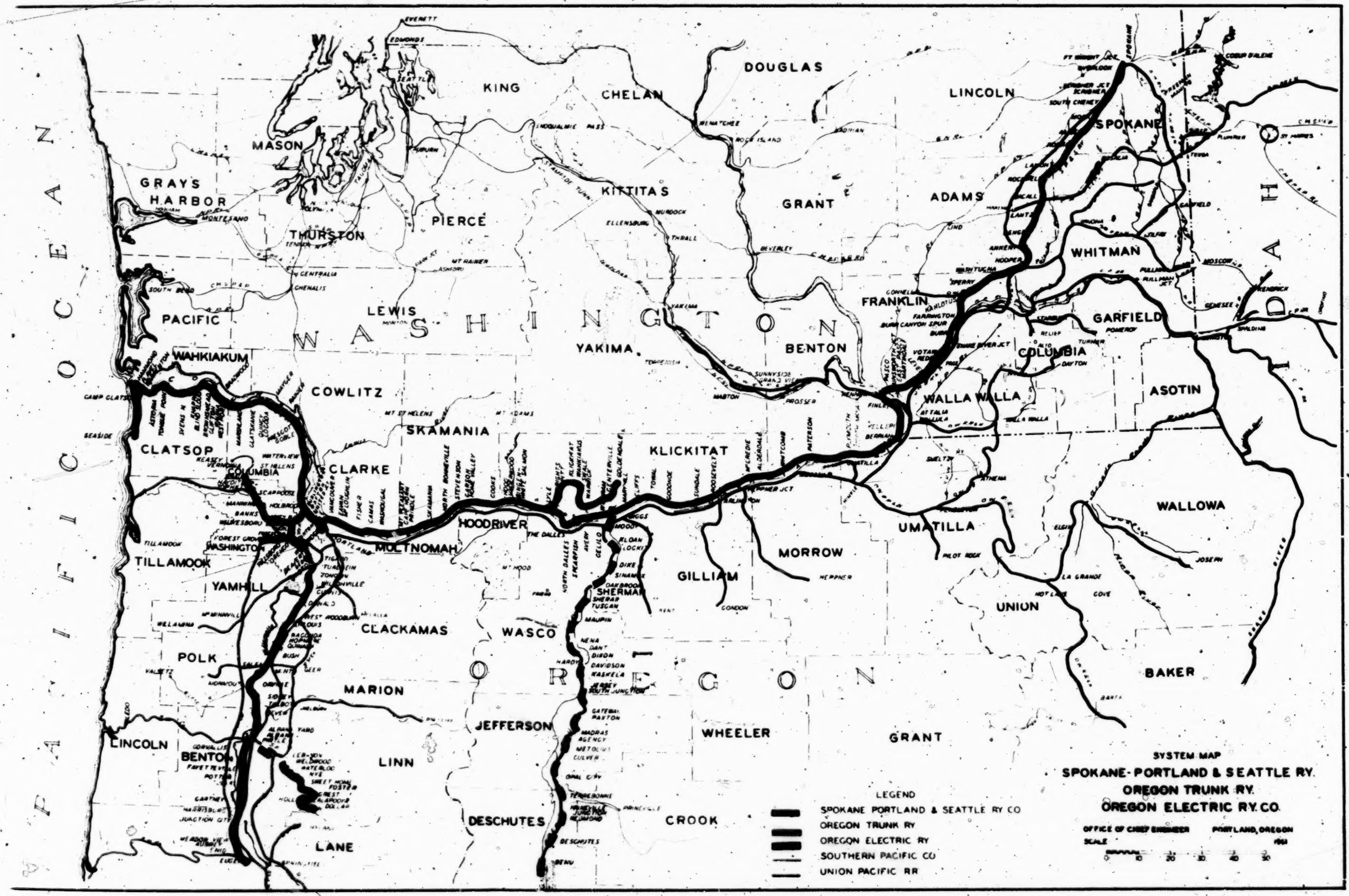
routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section."

Section 15(4) of the Interstate Commerce Act, 49 U.S.C. Section 15(4):

"In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) un-

less such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitation in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

APPENDIX B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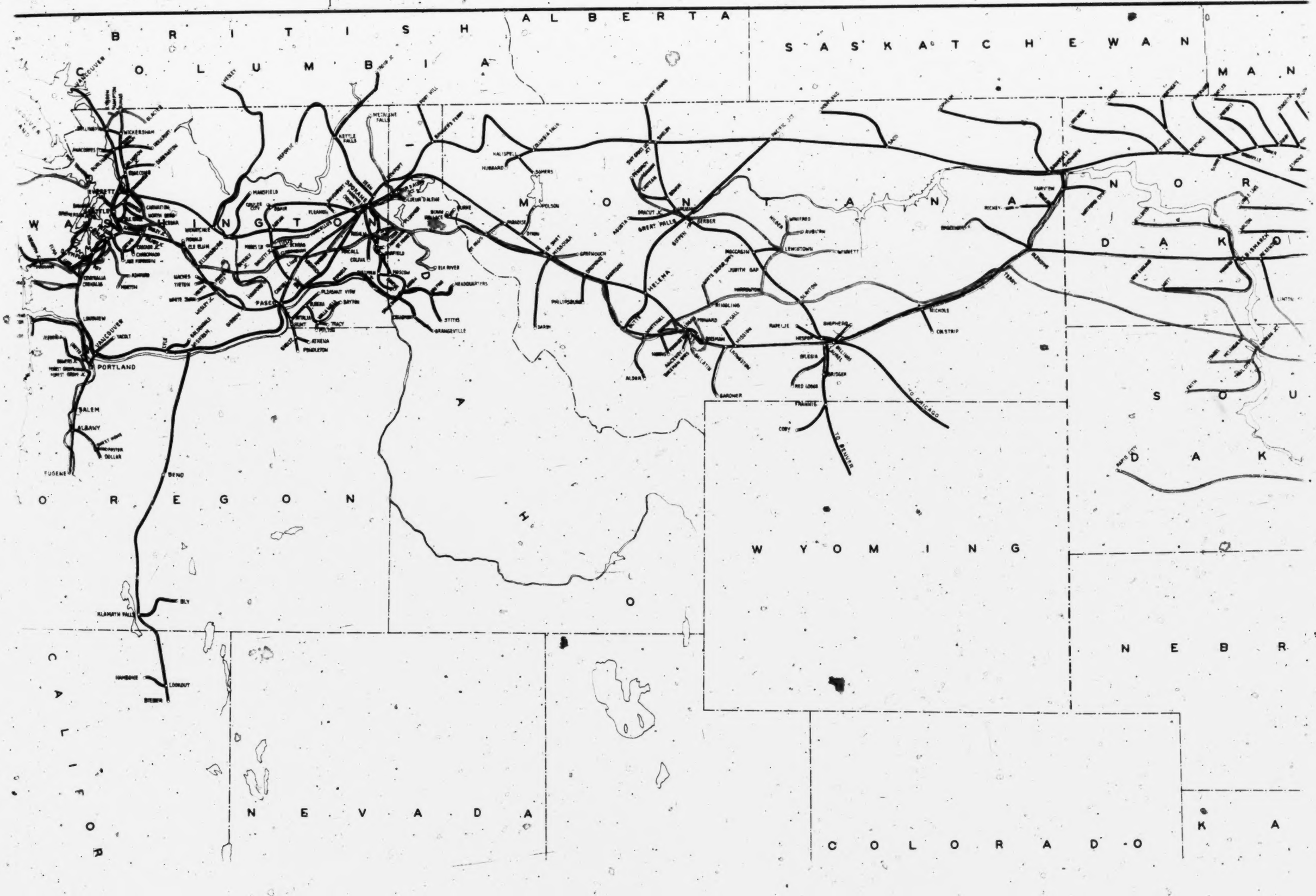
LEGEND
SPOKANE PORTLAND & SEATTLE RY CO
OREGON TRUNK RY
OREGON ELECTRIC RY
SOUTHERN PACIFIC CO
UNION PACIFIC RR
SYSTEM MAP
SPOKANE-PORTLAND & SEATTLE RY.
OREGON TRUNK RY.
OREGON ELECTRIC RY. CO.
OFFICE OF CHIEF ENGINEER PORTLAND, OREGON
SCALE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GRAFTON
LANGDON
CARRINGTON
JAMESTOWN
EDGELEY
LISBON
ELLENDALE
OAKES
VALLEY CITY
FARGO
WAHPETON
MOORHEAD
DILWORTH
GRAND FORKS
EMERADO
GRAFTON
DEVILS LAKE
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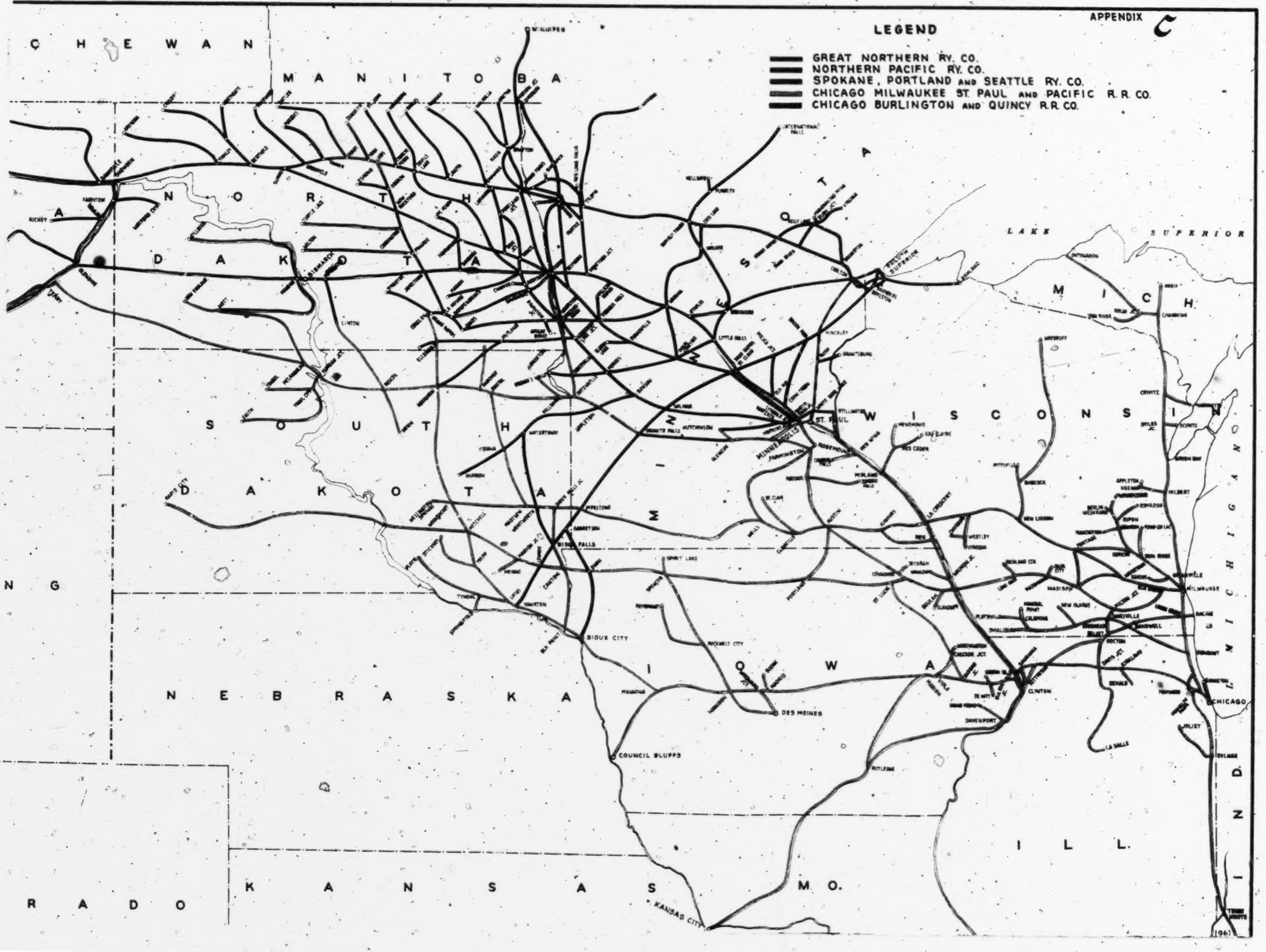
APPENDIX C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NORTHERN PACIFIC RY. CO.
SPOKANE, PORTLAND AND SEATTLE RY. CO.
CHICAGO MILWAUKEE ST. PAUL AND PACIFIC R.R. CO.
CHICAGO BURLINGTON AND QUINCY R.R. CO.
C H E W A N
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D A K O T A
S O U T H
D A K O T A
N E B R A S K A
K A N S A S
M O.
I L L.
M I C H.
W I S C O N S I N
I O W A
LAKE SUPERIOR
MICHIGAN
MINNEAPOLIS
ST. PAUL
DULUTH
SUPERIOR
SIOUX CITY
DES MOINES
COUNCIL BLUFFS
KANSAS CITY
CHICAGO
CLINTON
DAVENPORT
1961